No. 76-1629

In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
MAY 20 1977
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General,

JEROME M. FEIT,
ROGER A. PAULEY,
MICHAEL W. FARRELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below 1

Jurisdiction 1

Question presented 2

Constitutional and statutory provisions involved 2

Statement 3

Reasons for granting the petition 6

Conclusion 22

Appendix A 1a

Appendix B 9a

Appendix C 10a

CITATIONS

Cases:

Abbate v. *United States*, 359 U.S. 187 5, 16, 17
Ashe v. *Swenson*, 397 U.S. 436 21
Barta v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 12
Blackledge v. *Perry*, 417 U.S. 21 20
Colliflower v. *Garland*, 342 F.2d 369 14
DeCanas v. *Bica*, 424 U.S. 351 17
Diaz v. *United States*, 223 U.S. 442 20, 21
Fisher v. *District Court*, 424 U.S. 382 12
Grafton v. *United States*, 206 U.S. 333 16, 17
Gray v. *United States*, 394 F.2d 96, certiorari denied, 393 U.S. 985 8-9
Iron Crow v. *Oglala Sioux Tribes of Pine Ridge Res.*, 231 F.2d 89 14

Cases—Continued Page

Jones v. *Rath Packing Co.*, No. 75-1053, decided March 29, 1977 17
Keeble v. *United States*, 412 U.S. 205 13
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164 ..... 5, 11, 17
Oliphant v. *Schlie*, 544 F.2d 1007, petition for a writ of certiorari pending *sub nom. Oliphant* v. *The Squamish Indian Tribe, et al.*, No. 76-5729 ..... 13, 14
O'Neal v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140 18
Ortiz-Barraza v. *United States*, 512 F.2d 1176 14
Pennsylvania v. *Nelson*, 350 U.S. 497 17
Reina v. *United States*, 364 U.S. 507 17
Roff v. *Burney*, 168 U.S. 218 11
Sam v. *United States*, 385 F.2d 213 9
Santa Clara Pueblo v. *Martinez*, No. 76-682, certiorari granted May 16, 1977 12
Settler v. *Lameer*, 507 F.2d 231 14
Talton v. *Mayes*, 163 U.S. 376 ..... 11, 15
Tom v. *Sutton*, 533 F.2d 1101 14
United States v. *Antelope*, No. 75-661, decided April 19, 1977 ..... 10-11, 13
United States v. *Burns*, 529 F.2d 114 .....
United States v. *DeCoteau*, 516 F.2d 16 8
United States v. *DeMarrias*, 441 F.2d 1304 8
United States v. *Kagama*, 118 U.S. 375 12
United States v. *Keeble*, 459 F.2d 757, reversed, 412 U.S. 205 8
United States v. *Kills Plenty*, 466 F.2d 240 ..... 8, 14
United States v. *Lanza*, 260 U.S. 377 16

Cases—Continued Page

United States v. *Mazurie*, 419 U.S. 544 ..... 11, 12
United States v. *Quiver*, 241 U.S. 602 ..... 11, 13
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 12
Waller v. *Florida*, 397 U.S. 387 17
Williams v. *Lee*, 358 U.S. 217 ..... 11, 19
Worcester v. *Georgia*, 6 Pet. 515 11

Constitution, statutes and regulation:

United States Constitution:

- Article 1, Section 8, clause 3 10
- Fifth Amendment (Double Jeopardy Clause) 2, 4, 5, 7, 10, 15, 17, 20

Act of March 3, 1817, 3 Stat. 383 12
Act of March 27, 1854, 10 Stat. 269 12
Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585 13
Major Crimes Act of March 3, 1885, 23 Stat. 362, as amended, 18 U.S.C. 1153 ..... 2, 4, 6, 7, 8, 12
Pub. L. 93-580, 88 Stat. 1910, as amended, 25 U.S.C. (Supp. V) 174 9
18 U.S.C. 1152 12
18 U.S.C. 2032 ..... 3, 6
25 U.S.C. 1302(7) 8
Ariz. Rev. Stat. Ann. (1956):

- Section 13-252 4
- Sections 13-821 and 13-822 21

25 C.F.R. 11.1 *et seq.* 18

Miscellaneous:

American Indian Policy Review Commission (Final Report May 17, 1977) 9, 18, 19

Miscellaneous—Continued — Page

Brophy and Aberle, *The Indian: America's Unfinished Business* (1966) 19
Cohen, *Federal Indian Law* (1958 ed.) 11, 12
Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311 (1969) 18
Navajo Tribal Code, Title 17 (1972):
  Section 321 4
  Section 531 .... 3, 4
Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights In Conflict*, 22 Univ. of Kans. L. Rev. 387 (1974) 19

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 545 F.2d 1255.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on December 2, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 23, 1977 (App. C, *infra*). On April 13, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars federal prosecution of an Indian defendant for violation of the Major Crimes Act (18 U.S.C. 1153) because of his earlier conviction in Indian tribal court of a lesser included offense arising from the same acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 1153 provides in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

* * * * *

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

Title 17, Section 531, of the Navajo Tribal Code (1972) provides:

> Any Indian who shall willfully contribute to the delinquency of any minor shall be deemed guilty of an offense and, upon conviction thereof, shall be sentenced to labor for a period not to exceed 6 months.

STATEMENT

On October 16, 1974, an incident involving a young Indian girl occurred on the Navajo Indian Reservation in Many Farms, Arizona. Respondent, a Navajo Indian, was found intoxicated and taken into custody by an Indian policeman in connection with the incident (R.T. 10, 13). Two days later, he pleaded guilty in the Navajo Tribal Court to charges of willfully contributing to the delinquency of a minor and disorderly conduct, in violation of Title 17, Sections 531 and 321, of the Navajo Tribal Code (1972) (App. A, *infra*, p. 2a). Respondent was sentenced to serve 60 days at hard labor [1] or to pay a fine of $120. (The record does not show how the sentence was carried out.)

On May 21, 1975, an indictment was returned in the United States District Court for the District of Arizona charging that respondent, on October 16, 1974, "did assault * * * with intent to rape" the Indian girl, in violation of the Major Crimes Act, 18 U.S.C. 1153, and Ariz. Rev. Stat. Ann. § 13-252 (1956). This indictment was dismissed on grounds not relevant here.[2] A superseding indictment returned on November 19, 1975, charged that on October 16, 1974, respondent "did carnally know a female Indian * * *, not his wife, who had not then attained the age of sixteen years but was fifteen years of age," in violation of 18 U.S.C. 1153 and 2032.

Respondent moved to dismiss this indictment on the ground that his federal prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment because of his previous conviction in tribal court of a lesser included offense arising from the same transaction. The district court granted the motion to dismiss.

The court of appeals affirmed. The court framed the primary issue as "whether Indian tribal courts and federal district courts are 'arms of different sovereigns' for purposes of the Double Jeopardy Clause" (App. A, *infra*, p. 1a). The court noted that tribal courts "are not merely a political unit of the Federal Government" and that the Indians are a "separate people, with the power of regulating their internal and social relations" (*id.* at 4a-5a, quoting *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 173). But the court concluded that the Indian tribes "do not have the sovereign status of a state" (App. A, *infra*, p. 5a), and thus that "Indian tribal courts and United States district courts are not arms of separate sovereigns" (*id.* at 6a). On this basis the court rejected the proposition that the federal prosecution here was permitted by analogy to the "dual sovereignty" rationale adopted by this Court in the federal-state context, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187.

The court then invoked the rule, which it viewed as settled, that the Double Jeopardy Clause bars prosecution of a defendant for a crime after he has previously been convicted by the same sovereign of a lesser included offense based upon the same acts (App. A, *infra*, p. 7a). The court therefore held that "an individual cannot be indicted in federal court for a crime after having been tried in Indian tribal court for a lesser included offense" (*id.* at 8a). With respect to the charges here, the court determined that the offense of willfully contributing to the delinquency of a minor (one of the tribal offenses) was a lesser included offense to carnal knowledge of a female under the age of 16 years (the federal charge) (*id.* at 7a-8a).[3]

---

[1] Respondent was sentenced to concurrent terms of 60 days on the contributing to the delinquency of a minor charge and 15 days or $30 on the disorderly conduct charge.

[2] The district court determined that a provision of 18 U.S.C. 1153 (since deleted from the statute) giving the court discretion to impose imprisonment for the crimes of rape and assault with intent to rape when committed by an Indian against a female Indian was impermissibly vague.

REASONS FOR GRANTING THE PETITION

1. The court of appeals' holding in this case means that an Indian who is convicted (or, by the same token, who is acquitted) in tribal court of a violation of tribal law that constitutes a lesser included offense to one of the enumerated Major Crimes (18 U.S.C. 1153) may not subsequently be tried in federal district court for the greater or "inclusive" offense arising from the same act. As a result of this holding, respondent has avoided prosecution for a major federal crime, for which he was liable to be imprisoned for up to 15 years (18 U.S.C. 2032), by pleading guilty to a minor offense in tribal court and thereby incurring a relatively minor sentence. This result is unjust[4] and is not required by the command of the Double Jeopardy Clause.

---

[3] Although in the court of appeals we contended that the tribal offense was not a lesser included offense to the federal charge, we do not present this as a question in the petition because it is not of sufficient general importance to warrant review by this Court.

[4] While the offense with which respondent is here charged —carnal knowledge of a minor female—does not necessarily

If permitted to stand, the decision of the court of appeals will jeopardize effective law enforcement on Indian reservations and may necessitate extensive restructuring of the respective jurisdictions or procedures of tribal and federal courts with respect to cases arising on Indian reservations. If the court of appeals is correct, Indians who commit major crimes such as murder, arson, or rape, which subject them to federal prosecution and the possibility of significant punishment under 18 U.S.C. 1153, would secure immunity from such prosecution by standing trial on a minor offense in Indian tribal court that is a lesser-included offense of the major crime giving rise to federal court jurisdiction. Moreover, since federal prosecutors have no control over the institution and disposition of proceedings in tribal court, federal authorities would be virtually powerless to prevent potential major-crimes defendants from acquiring immunity from meaningful prosecution by undergoing tribal court trial on a petty offense. Tribal proceedings in any event are often held so swiftly that federal prosecutors may not even be aware of the commission of the offense by the time

---

entail any use of force by the defendant, there was here at least a prima facie case of forcible sexual assault (as is evidenced by the original indictment for assault with intent to commit rape, which was dismissed on technical grounds unrelated to respondent's culpability, see note 2, *supra*). If respondent indeed committed a forcible sexual assault, the sentence imposed by the tribal court, which respondent could satisfy by paying a fine of $120, hardly seems just punishment.

the tribal trial has been held, let alone be able to present the matter to a grand jury and convene a trial; here, for instance, the sexual assault occurred on October 16 and respondent pleaded guilty to the tribal offense on October 18 (see App. A, *infra*, p. 2a).

The possibility of large numbers of such occurrences is substantial. In addition to the present case, there are numerous reported instances in which an Indian defendant in federal court has been previously tried in a tribal court for a minor offense arising out of the same acts. See, *e.g.*, *United States* v. *Keeble*, 459 F.2d 757 (C.A. 8), reversed, 412 U.S. 205; *United States* v. *Kills Plenty*, 466 F.2d 240 (C.A. 8); *United States* v. *DeCoteau*, 516 F.2d 16 (C.A. 8); *United States* v. *DeMarrias*, 441 F.2d 1304 (C.A. 8); see *United States* v. *Walking Crow*, Cr. 76-3053 (D. S.D.), appeal pending C.A. 8 (No. 77-1136).

The problem is exacerbated by the fact that Indian tribal courts lack jurisdiction to impose significant punishment for criminal offenses. Indian tribal courts may "in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both * * *." 25 U.S.C. 1302(7). Jurisdiction to prosecute major felonies committed by Indians within Indian country has been given to federal courts under 18 U.S.C. 1153. See, *e.g.*, *Gray* v. *United States*, 394 F.2d 96 (C.A. 9), certiorari denied, 393 U.S. 985; *Sam* v. *United States*, 385 F.2d 213 (C.A. 10). Yet the holding of the court of appeals here will effectively remove from federal courts the power to try offenders for major crimes committed in Indian country in the potentially numerous cases in which a defendant has first been tried on a minor offense in a tribal court.

Because of the impediment it creates to effective federal law enforcement, the decision in this case ultimately threatens to impair the jurisdictional balance between Indian tribes and the federal government that has evolved historically in response to the legitimate competing interests of both of these separate governmental entities. It is reasonable to predict that this decision will generate considerable pressures upon the Congress further to circumscribe the authority of the Indian tribes in criminal matters, and thus to impede current efforts to strengthen the autonomy and authority of the tribal courts to regulate internal Indian affairs. As the American Indian Policy Review Commission[5] has stated with specific reference to this case (Final Report, p. 5-29):

---

[5] The Commission was established by Pub. L. 93-580, Jan. 2, 1975, 88 Stat. 1910, "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians" (25 U.S.C. (Supp. V) 174). The Commission's Report was submitted to the Congress on May 17, 1977.

> The implications of [the *Wheeler*] decision for jurisdiction of Indian tribes and for the power of Congress to take corrective action through legislation are apparent. If the doctrine of double jeopardy is applicable to judgments of tribal courts, there seems little doubt that either the Courts or Congress will soon strip the tribes of authority to act in any situation which might potentially be prosecuted in Federal court. It is simply not tolerable that a person can plead guilty in tribal court to a minor offense and thereby preclude prosecution in Federal court for a major offense. It is essential that the separate sovereignty of the tribes continue to be recognized if the jurisdictional balance between tribal and Federal courts is to be maintained.

The dilemma thus posed by the court of appeals' decision—between serious impairment of federal prosecutorial authority, on the one hand, and perhaps severe curtailment of the jurisdiction of tribal courts, on the other—is sufficiently significant to warrant this Court's attention. Moreover, in our view the decision of the court of appeals is incorrect. For the reasons explained briefly below, there is no bar under the Double Jeopardy Clause to the federal prosecution in this case.

2. a. The Indian tribes are treated in the United States Constitution *in pari materiae* with States and foreign nations. Article I, Section 8, clause 3. While recognizing that the Indian tribes are no longer sovereign nations—they are "once-sovereign political communities" (*United States* v. *Antelope*, No. 75-661,

decided April 19, 1977, slip op. 5)—this Court has repeatedly emphasized that they possess a "unique status * * * as 'a separate people' with their own political institutions" (*ibid.*), that they "are unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557), and that the statutes and treaties defining their relations with other governments must be read against the "backdrop" of their former sovereignty as nations (*McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 172).

As a part of the Indian tribes' "unique status," this Court has recognized that in the absence of an explicit withdrawal of jurisdiction by Congress, the power to try and punish criminal behavior by Indians within Indian country inheres in tribal courts, and that the power of these tribal courts does not depend upon an express grant of power from Congress but is a residual attribute of tribal sovereignty that often has been expressly recognized by treaty. *Worcester* v. *Georgia*, 6 Pet. 515; *Talton* v. *Mayes*, 163 U.S. 376; *United States* v. *Quiver*, 241 U.S. 602, 605; see Cohen, *Federal Indian Law* 395 (1958 ed.).[6]

---

[6] The decisions of this Court have consistently emphasized that "the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee*, 358 U.S. 217, 220) is an unextinguished residuum of the tribes' ancient sovereignty. It is settled, for example, that the tribes, like other governmental entities, have the authority to confer or withdraw citizenship in the tribe in the absence of express legislation by Congress to the contrary. *Roff* v. *Burney*, 168 U.S. 218, 222;

Congress also has acknowledged the residual sovereignty of the tribes. Almost from the first federal assertion of statutory jurisdiction, Congress provided that "nothing in the * * * [statute] * * * shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian territory." Act of March 3, 1817, 3 Stat. 383; see Act of March 27, 1854, 10 Stat. 269, 270; 18 U.S.C. 1152. Even the Major Crimes Act (Act of March 3, 1885, 23 Stat. 362, 385), which made it a federal crime for an Indian to commit any of seven named major offenses

---

Cohen, *Federal Indian Law*, *supra*, at 414. Cf. *Santa Clara Pueblo* v. *Martinez*, No. 76-682, certiorari granted May 16, 1977. Similarly, as with other peoples who possess "the power of regulating their internal and social relations" (*United States* v. *Kagama*, 118 U.S. 375, 382), the tribes possess broad authority to grant marriages and divorces (*United States* v. *Quiver*, *supra*) and to provide for adoptions and guardianships. *Fisher* v. *District Court*, 424 U.S. 382. Furthermore, unless Congress has provided otherwise, the tribes are immune from suit in state or federal court, protected in much the same way as the Eleventh Amendment protects the States or the principle of sovereign immunity protects the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512. Finally, the tribes possess inherent authority to tax (*e.g.*, *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (C.A. 8)) and to regulate conduct on the reservation involving both Indians and non-Indians (*e.g.*, *United States* v. *Mazurie*, 419 U.S. 544 (upholding, as to non-Indians, a tribal ordinance requiring a license to sell liquor in Indian country)).

against another Indian on an Indian reservation,[7] is properly viewed only as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." See *Keeble* v. *United States*, 412 U.S. 205, 209, quoted in *United States* v. *Antelope*, *supra*, slip op. 1-2 n. 1.[8]

Accordingly, the Navajo Tribal Court, in which respondent was convicted, functions not as an instrumentality of the federal government but as an institution whose authority flows from the residual sovereignty of the tribes as "a separate people."[9] Within its sphere of authority, the tribal court's jurisdiction is exclusive. The powers exercised by tribal authorities over tribal Indians within a reservation thus more closely resemble the powers customarily exercised by a State than those of the federal government.

---

[7] The Act presently includes 14 enumerated offenses. See Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585.

[8] After enactment of the Major Crimes Act, the Court in *United States* v. *Quiver*, *supra*, reaffirmed the principle that punishment for offenses by one Indian against another, other than for those offenses enumerated in the Major Crimes Act, remains within the exclusive jurisdiction of the tribes. This principle, the Court said (241 U.S. at 605-606), was "in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[.]"

[9] In *Oliphant* v. *Schlie*, 544 F.2d 1007 (C.A. 9), petition for a writ of certiorari pending *sub nom. Oliphant* v. *The Suquamish Indian Tribe, et al.*, No. 76-5729, the court of appeals, in holding that a tribal court could properly try and convict a non-Indian for certain tribal offenses, reasoned that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish [tribe] originally possessed" (544 F.2d at 1009). In the court's view, the question was "not whether Congress has conferred jurisdiction

---

[over non-Indians] upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question * * * is, did Congress (or a treaty) take that jurisdiction away" (544 F.2d at 1009 n. 1).

The Ninth Circuit's statements in *Oliphant* concerning Indian sovereignty are inconsistent with its view in this case that "Indian tribal courts and United States district courts are not arms of separate sovereigns" (App. A, *infra*, p. 6a). Indeed, the Ninth Circuit has been inconsistent in other cases as well on the question whether, or for what purposes, the tribal courts are agents of the same sovereign as the federal district courts. In *Tom* v. *Sutton*, 533 F.2d 1101, the court rejected a claim that either the Sixth or the Fourteenth Amendment entitles defendants in tribal criminal proceedings to appointed counsel. Citing *Talton* v. *Mayes*, *supra*, and other cases, the court stated (533 F.2d at 1103): "The rationale underlying these cases is that the Indian tribes are quasi-sovereign nations. * * * Under their sovereign status, the Indian tribes are vested with the inherent power to create and administer a criminal justice system." The court added (533 F.2d at 1103 n. 1) that the Indian Citizenship Act (8 U.S.C. 1401) "did not destroy the existence or sovereignty of the Indian tribes or their jurisdiction over their members." See also *Settler* v. *Lameer*, 507 F.2d 231 (C.A. 9); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176 (C.A. 9). But see *Colliflower* v. *Garland*, 342 F.2d 369 (C.A. 9).

The Eighth Circuit in *United States* v. *Kills Plenty*, *supra*, 466 F.2d at 243, when similarly confronted with "the troublesome contention that tribal courts and United States District Courts derive their adjudicatory powers from the same sovereign," stated (in *dictum*) that "it is our view that the Tribal Courts are not arms of the same sovereign as the United States District Court" (466 F.2d at 243 and n. 3). See *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (C.A. 8).

The court of appeals said, however (App. A, *infra*, pp. 5a-6a), that Indian tribes cannot meaningfully be regarded as separate political entities because the federal government has complete power over Indian affairs and, in particular, "has complete, plenary control over the criminal jurisdiction of tribal courts." But this reasoning is beside the point. As this Court stated in *Talton* v. *Mayes*, *supra*, 163 U.S. at 384: "[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States."

In *Talton*, the Court held that the Fifth Amendment does not apply to the Indian tribes, because the powers that they exercise are not "federal powers" but are inherent in their status as quasi-sovereigns: "It follows that as the powers of local self government * * * existed prior to the Constitution, they are not operated upon by the Fifth Amendment * * *" (163 U.S. at 384). The court of appeals' analysis in this case is fundamentally inconsistent with the analysis in *Talton*. Tribal courts cannot at the same time be so autonomous that the Fifth Amendment does not apply to tribal judicial proceedings, yet so identified with the federal government that a tribal prosecution is viewed as nothing more than prosecution by an arm of the federal sovereign.

b. Since tribal prosecutions are not prosecutions by an arm of the federal sovereign, the Double Jeopardy Clause should not apply to bar prosecution in federal court after prosecution in a tribal court for a lesser included offense arising out of the same acts. The tribes and the federal government, "deriving power from separate sources," have each separately determined "what shall be an offense against its peace and dignity" (*United States* v. *Lanza*, 260 U.S. 377, 283). Here, for example, respondent's conduct violated a tribal ordinance designed to enforce the tribe's interest in maintaining the internal peace and order of the Indian community, and respondent therefore properly was subject to punishment by the tribal court. At the same time his conduct also may have constituted a major federal crime. Each governmental unit—federal and tribal—should be entitled to give effect to its separate peace-keeping interest.

In many respects, the consequences outlined above (pp. 6-10) of the court of appeals' holding to the contrary are analogous to the "undesirable consequences" that persuaded this Court in *Abbate* v. *United States*, *supra*, 359 U.S. at 195, to reject a plea that it overrule its holding in *Lanza* that a previous conviction by a state does not operate as a constitutional bar to federal prosecution for the same acts.[10] In both contexts, federal law enforcement would "necessarily be hindered" (359 U.S. at 195) if the Double Jeopardy Clause were held to bar a federal prosecution following a prosecution by the other governmental authority.

Moreover, although its power is not plenary (as it is with Indian tribes), Congress has substantial authority to preempt state criminal jurisdiction,[11] yet "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law" (*ibid.*). This same analysis also should apply to Indian tribal courts. As in the case of States, the mere existence of the federal government's authority to preempt tribal court criminal jurisdiction does not mean that the federal government is constitutionally required to exercise that authority in order to insure that its own law enforcement efforts are not hindered.

---

[10] The court of appeals stated that if "forced to choose a relevant analogy" (App. A, *infra*, 5a) by which to define the status of tribal courts, it would select not state courts, but territorial courts, which were described by this Court in *Grafton* v. *United States*, 206 U.S. 333, as "civil court[s] proceeding under the authority of the United States" (App. A, *infra*, pp. 5a-6a). But, unlike tribal courts generally, the Philippine territorial court under consideration in *Grafton* plainly was an "instrumentality" of the federal government. It "owe[d] its existence wholly to the United States," from which it "derive[d] its powers" and by whose authority it "exert[ed]" them (206 U.S. at 354. Its relation to the federal government was, as this Court has since observed (*Waller* v. *Florida*, 397 U.S. 387), closely akin to the relationship between municipal and state governments, the powers of the former "spring[ing] from the same organic law that create[s]" the powers of the latter (397 U.S. at 393). But since it "would [be] vastly oversimpli[fied] * * * to say that nothing remains of the notion that reservation Indians are a separate people" with power "to make their own laws and be ruled by them" (*McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 170, 172), this analogy is inapposite to the relationship between the federal government and the Indian tribes. If there need be any "relevant analogy," it should be to the state-federal "dual prosecution" doctrine.

[11] See, *e.g.*, *Jones* v. *Rath Packing Co.*, No. 75-1053, decided March 29, 1977; *DeCanas* v. *Bica*, 424 U.S. 351; *Reina* v. *United States*, 364 U.S. 507; *Pennsylvania* v. *Nelson*, 350 U.S. 497.

Displacement of Indian tribal court jurisdiction not only would "bring about a marked change in the distribution of powers to administer criminal justice" (359 U.S. at 195) between the Indian and federal courts, but also would be at odds with efforts of the federal government to foster tribal self-government. There currently are tribal courts operating on approximately 71 reservations,[12] handling tens of thousands of cases per year.[13] These courts generally are viewed as central to the preservation of Indian culture and political identity. See, *e.g.*, *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-1145 (C.A. 8).

The Final Report of the American Indian Policy Review Commission (p. 5-42) includes a finding

---

[12] This figure is obtained from statistics compiled by the Department of Interior as of March 18, 1977. In addition to the "tribal courts," there are 16 "traditional" or semi-religious courts, possessing no written ordinances, and 32 Courts of Indian Offenses ("C.F.R." courts) established by the Department of Interior for reservations that possess no judicial institutions (see 25 C.F.R. 11.1 *et seq.*). See Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311, 321-322 (1969).

[13] Tribal courts, together with the courts listed in note 12, *supra*, handle an estimated 80,000 or more cases per year. American Indian Policy Review Commission (Final Report, p. 5-36).

that tribal courts, though varying greatly in individual performance,[14] on the whole "are evolving institutions that are capable of fair and efficient justice." The Report recommends that Congress take steps to promote their "maintenance and development"—development that "will require tribal experimentation and time." The decision of the court below, however, seriously threatens any efforts to enhance the capability and authority of the tribal courts. As one commentator has stated: "If, ultimately, tribal criminal trials were to become protective mechanisms for potential Major Crimes Act defendants, a political resolution of the situation in Congress would probably result, and that resolution would undoubtedly see a further cutback in tribal criminal jurisdiction." Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev. 387, 406 (1974); see Final Report, *supra*, at p. 5-29.

3. We submit alternatively that, even if the federal and the tribal courts are viewed as "arms" of the same sovereign, the Double Jeopardy Clause does not bar the federal prosecution in this case. The decision of the court of appeals rests on the assumption that

---

[14] The Navajo Tribal Court, in which respondent here was convicted, is one of the most highly developed of the tribal judicial systems, possessing, for example, its own complete legal code applicable to the more than 100,000 tribal members. See *Williams* v. *Lee*, *supra*, 358 U.S. at 222; Brophy and Aberle, *The Indian: America's Unfinished Business* 59 (1966).

the Double Jeopardy Clause always bars prosecution of a defendant for a crime after a previous conviction by the same sovereign of a lesser included offense based on the same acts. But, as we argued in our brief in *Jeffers* v. *United States*, No. 75-1805, argued March 21, 1977 (Br. 13-15, 39-47), it does not violate the Double Jeopardy Clause to prosecute a defendant for a greater offense after having successfully prosecuted him on a lesser included offense, so long as he was not in jeopardy on the greater offense at the first trial and is not placed in jeopardy again on the lesser included offense at the second trial.[15] See *Diaz* v. *United States*, 223 U.S. 442, 449. When such a defendant is tried on the lesser offense, he is not in jeopardy of conviction of and punishment for the greater. And if he is convicted of the lesser (see Br. 41-42), in a subsequent prosecution for the greater the defendant can be fully protected from being "twice put in jeopardy" for the lesser offense by measures less drastic than barring the second trial altogether (see Br. 47 n. 27).[16]

In this case, respondent was not put in jeopardy of conviction of carnal knowledge in the tribal court. His federal trial would therefore be the first jeopardy

of conviction of carnal knowledge to which he would be exposed. Moreover, respondent would not again be in jeopardy for the tribal offense during his federal trial, since the federal court has no jurisdiction over offenses listed in the Navajo Tribal Code.[17] Accordingly, prosecution in federal court following the conviction in tribal court would not place respondent twice in jeopardy for either offense. Respondent should therefore not be insulated from the federal prosecution. Cf. *Ashe* v. *Swenson*, 397 U.S. 436, 453 n. 7 (concurring opinion of Mr. Justice Brennan).

---

[15] We are furnishing a copy of our brief in *Jeffers* to counsel for petitioner.

[16] If the prosecution has unfairly and unreasonably subjected a defendant to a series of prosecutions for related offenses of escalating gravity, the defendant would have a remedy under the Due Process Clause. Cf. *Blackledge* v. *Perry*, 417 U.S. 21.

[17] There is only one way in which a charge of contributing to the delinquency of a minor might be considered in federal court despite that court's lack of independent jurisdiction over the offense—*i.e.*, if the defendant requested such a charge upon the authority of *Keeble* v. *United States*, *supra*. (The lesser-included offense would presumably have to be derived from state rather than tribal law; here, Arizona has a statute proscribing acts contributing to the delinquency of a minor (Ariz. Rev. Stats. Ann. §§ 13-821, 13-822), although the elements are slightly different from those of the tribal offense). Since it would be up to the defendant to request such a charge, he may easily avoid the risk of conviction on the delinquency offense by not requesting that it be charged. And even if a verdict were returned on the lesser offense, no judgment could be entered or punishment administered upon such a verdict if the same sovereign had already tried the defendant for the offense. See *Diaz* v. *United States*, *supra*, 223 U.S. at 449.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Wade H. McCree, Jr.,
Solicitor General.

Benjamin R. Civiletti,
Assistant Attorney General.

Stephen L. Urbanczyk,
Assistant to the Solicitor General.

Jerome M. Feit,
Roger A. Pauley,
Michael W. Farrell,
Attorneys.

May 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1509

[Filed Dec. 2, 1976, U. S. Court of Appeals,
Emil E. Melfi, Jr., Clerk]

United States of America, plaintiff-appellant

vs.

Anthony Robert Wheeler, defendant-appellee

Appeal from the United States District Court for the District of Arizona

Before: **Goodwin** and **Sneed**, Circuit Judges, and **East**,* District Judge.

OPINION

Sneed, Circuit Judge:

This case presents the question whether Indian tribal courts and federal district courts are "arms of different sovereigns" for purposes of the Double Jeopardy Clause.[1] We hold that they are not arms of separate sovereigns and, therefore, that an individual cannot be tried for the same offense before both an Indian tribal court and court of the United States Government. Furthermore, we hold that the guarantee against double jeopardy has been violated in this case.

---

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] While the court in United States v. La Plant, 156 F. Supp. 660, 662 (D.C. Mont. 1957) granted defendant's motion to

The defendant, a Navajo Indian, plead guilty in Navajo tribal court on October 18, 1974 to charges of contributing to the delinquency of a minor[2] and disorderly conduct,[3] the charges growing out of an incident that had occurred on Indian territory two days earlier. Over a year later the defendant was indicted in federal court for carnal knowledge of a female Indian under the age of sixteen years.[4] There is no dispute that the federal charge grew out of the same incident and the same actions of the defendant as the "contributing to the delinquency of a minor" charge before the Navajo tribal court. Before trial, the district court judge dismissed the indictment "on the basis that the defendant [had] already once been placed in jeopardy for the same offense." We affirm.

I.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. However, the Supreme Court held early in its history that the Double Jeopardy Clause does not prevent a federal court from trying a person for the same crime for which he had been tried previously by a state court, and vice-versa. *See Moore* v. *Illinois*, 55 U.S. (14 How.) 13 (1852).[5] As explained by the Court:

> Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for infraction of the laws of either. The same act may be an offense or transgression of the laws of both . . . . That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable.

---

dismiss "on the ground that defendants would be placed in double jeopardy by reason of conviction for the same offense in the Blackfeet Tribal Court," the Government had conceded the issue in its brief.

See also U. S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 447-448 (1958), asseverating that "the punishment of an Indian under ['the local law of the tribe'] must be deemed a bar to further prosecution under any applicable Federal laws, even though the offense be one against a non-Indian," but backing this conclusion neither with citations nor with discussion.

[2] Title 17, section 321 of the Navajo Tribal Code.

[3] Title 17, section 351 of the Navajo Tribal Code.

[4] 18 U.S.C. §§ 1153, 2032 (1970).

[5] Despite criticism from within the Court, this "exception" to the double jeopardy guarantee has been repeatedly reaffirmed. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959).

Id. at 20. The Court has construed its "dual sovereignty" rationale narrowly and has never applied it outside of the federal court or state court context.[6] The Court has held that the double jeopardy guarantee proscribes prosecution in United States territorial court once the defendant has been tried for the same crime in federal military court, *see Grafton* v. *United States*, 206 U.S. 333 (1907), and also proscribes parallel prosecutions in state and municipal courts, *see Waller* v. *Florida*, 397 U.S. 387 (1970). According to the Court, these latter cases involve prosecutions before two courts of a single sovereign.

In the instant case, we are faced by a dual trial situation that does not fit neatly into either the "single sovereign" or "dual sovereign" categories. Indian tribal courts are not merely a political unit of the Federal Government, such as federal district courts, military tribunals, etc. Indian tribes do maintain a "semi-independent position" within the borders of the United States. *See McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172-173 (1973), *quoting United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886). But, at the same time, they

---

[6] As the Supreme Court recognized in United States v. Kagama, 118 U.S. 375 (1886), there are only two sovereign entities within the United States: the federal government and the states. "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two." 118 U.S. at 379.

clearly do not have the sovereign status of a state. Nor is their "semi-independence" like that accorded the Commonwealth of Puerto Rico.[7] As emphasized in *McClanahan, supra,* Indian tribes enjoy semi-independent status "*not as States, not as Nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside." 411 U.S. at 173, *quoting Kagama, supra,* 118 U.S. at 381-382 (emphasis added). The federal government has complete, plenary control over the criminal jurisdiction of tribal courts. *See Winton* v. *Amos*, 255 U.S. 373 (1921); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). It possesses no such control with respect to the states.

It follows that *Moore* v. *Illinois, supra* and its progeny are not applicable to the instant case. The double jeopardy guarantee applies. If forced to choose a relevant analogy by which to guide our decision in this case from amongst the courts considered by the Supreme Court in the double jeopardy-"dual sovereignty" context, we would select territorial courts, described in *Grafton* v. *United States, supra*, as "civil court[s] proceeding under the authority of the United States"; as already indicated, territorial courts are prevented by reason of double jeopardy from trying an individual for the same offense for which he already has been convicted by a United States military court. We find support for our conclusion that the double jeopardy guarantee applies here in *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965). There, this court reviewed the history of a tribal court system substantially similar to the history of the Navajo courts and concluded that

---

[7] Congress, in 1952, entered into a "compact" with "the people of Puerto Rico," giving Puerto Rico "Commonwealth" status and "the degree of autonomy and independence normally associated with States of the Union." Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 96 S. Ct. 2264, 2277-2279 (1976). As the Court in Flores de Otero noted, Puerto Rico's status is *sui generis*; "Puerto Rico occupies a relationship to the United States that has no parallel in our history." *Id.* at 2278.

> [i]n spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government.

Id. at 378-379.

In summary, Indian tribal courts and United States district courts are not arms of separate sovereigns. Indian tribes are not states. Thus, the defendant in the instant case could not be tried in federal district court for the same offense that he was previously convicted of in Navajo tribal court without violating the Double Jeopardy Clause of the Fifth Amendment.

II.

The Government argues that, even assuming the double jeopardy guarantee applies in the case before us, the defendant is not being tried for the same offense in federal court as he was convicted of in tribal court. We disagree.

A defendant does not have to be charged with the exact same offense before both courts in order for double jeopardy to exist. The double jeopardy guarantee is also violated where one of the charges is a "lesser included offense" of the other—where every violation of one charge necessarily constitutes a violation of the other. *See Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); *Gavieres* v. *United States*, 220 U.S. 338 (1911); *Henry* v. *United States*, 215 F.2d 639, 641 (9th Cir. 1954).

In the instant case, "contributing to the delinquency of a minor" (one of the two tribal court charges) is a lesser included offense to "carnal knowledge of a female under the age of sixteen years" (the federal charge). The two charges grew out of the same actions of the defendant. And the evidence necessary to convict the defendant of carnal knowledge would have been sufficient to convict the defendant of contributing to the delinquency of a minor. We find support for this holding in the state cases of *State* v. *Harvey*, 402 P.2d 17, 19 (Ariz. 1965) and *People* v. *Greer*, 184 P.2d 512, 517 (Cal. 1947), both holding that contributing to the delinquency of a minor is a lesser included offense to statutory rape.[*]

Therefore, we hold that an individual cannot be indicted in federal court for a crime after having been tried in Indian tribal court for a lesser included offense.

AFFIRMED.

---

[*] We find no evidence of a significant difference in the substance of the state offenses dealt with in *Harvey* and *Greer* and the offenses involved here that would warrant distinguishing those two cases.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1509

DC# CR 75-550 WPC

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ANTHONY ROBERT WHEELER, DEFENDANT-APPELLEE

Appeal from the United States District Court for the District of Arizona (Phoenix)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 2, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1509

[Filed Mar. 23, 1977, U. S. Court of Appeals,
Emil E. Melfi, Jr., Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ANTHONY ROBERT WHEELER, DEFENDANT-APPELLEE

Before: GOODWIN and SNEED, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Goodwin and Sneed have voted to reject the suggestion for a rehearing in banc, and Judge East has recommended rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

---

* Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: March 21, 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 235463 7

Supreme Court, U. S.
FILED
SEP 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-1629

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is submitted to bring to the Court's attention the recent decision of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Walking Crow*, No. 77-1136, decided August 10, 1977, which conflicts directly with the decision of Ninth Circuit in the present case. For the convenience of the Court, we have set forth the opinion in *Walking Crow* in an Appendix to this memorandum.

In *Walking Crow* an Indian defendant sought to bar federal prosecution for the crime of robbery under the Major Crimes Act, 18 U.S.C. 1153, after he had earlier pleaded guilty in the Rosebud Sioux Tribal Court to the lesser included charge of simple theft arising from the same conduct. Stating the issue to be "whether for double jeopardy purposes the tribal court of the Rosebud Sioux Tribe and the federal district court in South Dakota are adjudicatory arms of the same sovereign" (App., *infra*, p. 4a), the court of appeals acknowledged that "[t]he position of [defendant] is fully sustained by *United States* v. *Wheeler*, 545 F. 2d 1255 (9th Cir. 1976)" (*ibid.*). But the Eighth Circuit "disagree[d] with [the Ninth Circuit's] holding and decline[d] to follow it" (*ibid.*). It adhered instead to the view that it had previously expressed in *dictum* in *United States* v. *Kills Plenty*, 466 F. 2d 240, 243 n. 3 (C.A. 8), certiorari denied, 410 U.S. 916 (quoted at Pet. 14 n. 9) "that the Tribal Courts are not arms of the same sovereign as the United States District Court." See also *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Res.*, 231 F. 2d 89 (C.A. 8). The court concluded (App., *infra*, p. 5a):

> While [18 U.S.C. 1153] took away from the Indian tribes and their tribal courts jurisdiction over enumerated offenses, the jurisdiction that was left to them was in our view an inherent and original jurisdiction of quasi-sovereign powers. We hold that a tribal court in administering its residual jurisdiction is not acting as an adjudicatory arm of the federal government, and that it is not simply an inferior court in the federal judicial system.[1]

There is, accordingly, a square conflict between the Eighth and the Ninth Circuits on the question whether the Double Jeopardy Clause of the Fifth Amendment bars federal prosecution of an Indian defendant for violation of the Major Crimes Act because of his earlier conviction in Indian tribal court of a lesser included offense arising from the same acts.

---

[1] The court noted, in addition (App., *infra*, p. 5a):

> From a practical standpoint, the result that appellant would have us reach might mean that the felony jurisdiction conferred on the federal courts by §1153 could in instances be frustrated by relatively minor prosecutions in the tribal courts. Such a situation would be undesirable and might lead to still further congressional encroachment on the jurisdiction of those courts.

For this reason, as well as the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1136

UNITED STATES OF AMERICA, APPELLEE,

v.

JOHN WALKING CROW, APPELLANT.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF SOUTH DAKOTA.

Submitted: May 18, 1977

Filed: August 10, 1977

Before BRIGHT and HENLEY, Circuit Judges, and BENSON, Chief District Judge.*

HENLEY, Circuit Judge.

This case brings before us again the question that we found "troublesome" in *United States* v. *Kills Plenty*, 466 F. 2d 240, 243 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973), namely, whether Indian tribal courts and the district courts of the United States derive their adjudicatory powers from the same sovereign. In *Kills Plenty* the question arose in connection with a claim of collateral

---

*The Honorable Paul Benson, Chief District Judge, District of North Dakota, sitting by designation.

estoppel; here it arises in connection with a claim of double jeopardy.

On January 27, 1976 at Mission, South Dakota, which is located on the Rosebud Sioux Indian Reservation, appellant, John Walking Crow, a member of the Rosebud Sioux Tribe, robbed Thomas Standing Soldier, another member of the Tribe, of certain money or personal property. A charge of simple theft was filed against him in the tribal court of the Tribe on February 4, 1976; he entered a plea of guilty and presumably received misdemeanor punishment. In March, 1977 the federal grand jury for the District of South Dakota indicted appellant for the crime of robbery under the Indian Major Crimes Act, 18 U.S.C. § 1153, read in connection with 18 U.S.C. § 2111 which defines the offense of "robbery" when committed within the special territorial jurisdiction of the United States.[1]

Appellant filed a motion to dismiss the indictment claiming that since he had been convicted of theft in the tribal court and since the theft and the alleged robbery arose out of the same incident, the felony prosecution in the district court was prohibited by the double jeopardy clause of the fifth amendment to the Constitution of the United States.

---

[1] § 1153 provides that if an Indian commits against another Indian in the Indian country any one of a number of specified major crimes including robbery, the offender is to be punished in the same manner and to the same extent as all other persons who may commit the same offense within the exclusive jurisdiction of the United States.

§ 2111 provides that whoever within the special maritime or territorial jurisdiction of the United States "by force and violence, or by intimidation, takes from the person or presence of another, anything of value, shall be imprisoned not more than fifteen years."

The motion was denied, and after some delay due to the fact that appellant was tried and convicted of another felony under the Major Crimes Act, he submitted to a bench trial before District Judge Andrew W. Bogue, was found guilty and was sentenced to imprisonment for a period of three years with the sentence to run concurrently with the sentence that had been imposed in the other felony case.[2] He appeals.

There is no question that where a person is found guilty of an offense which is a "lesser included offense" that would be incorporated in a charge of a greater offense, he may not later be prosecuted for the greater offense in another court of the same sovereign. For example, a person cannot be prosecuted for a felony in a state court if he has already been convicted in a state municipal court of a misdemeanor growing out of the same act if the misdemeanor is a lesser offense included in the later felony charge. *Waller* v. *Florida*, 397 U.S. 387 (1970). Nor can a person be prosecuted in a federal territorial court after he has been prosecuted for the same crime in a federal military court. *Grafton* v. *United States*, 206 U.S. 333 (1907).

On the other hand, it is equally well established that if the same act constitutes an offense against two sovereigns, such as the United States and a State of the Union, the double jeopardy clause does not protect him from prosecution for the same offense in the courts of both sovereigns. *Abbate* v. *United States*, 359 U.S. 187 (1959), and cases cited.

---

[2] Appellant filed a notice of appeal in that case as well as in this one, but dismissed his appeal in the earlier case.

There is no question that simple larceny or theft is a lesser offense included in the offense of robbery defined in § 2111. *United States* v. *Belt*, 516 F. 2d 873 (8th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976). The question, then, is whether for double jeopardy purposes the tribal court of the Rosebud Sioux Tribe and the federal district court in South Dakota are adjudicatory arms of the same sovereign. If they are, the conviction before us must be reversed; otherwise, it must be affirmed.

The position of appellant is fully sustained by *United States* v. *Wheeler*, 545 F. 2d 1255 (9th Cir. 1976). With all due respect to that court, we disagree with its holding and decline to follow it. While we "pretermitted" the question in *Kills Plenty, supra*, we said in a footnote to the opinion written by Chief (now Senior) Judge Matthes that "it is our view that the Tribal Courts are not arms of the same sovereign as the United States District Court. *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956)." 466 F. 2d at 243, n. 3. We adhere to that view.

As is well known, the precise relationship between the federal government and the various Indian tribes as far as "sovereignty" is concerned is an anomalous one and has been discussed by the courts in one context or another ever since the days of John Marshall. No useful purpose would be served by repeating the discussion in detail.

In *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956), cited in *Kills Plenty, supra*, this court held that the tribes of Sioux Indians residing in the Dakotas have always been recognized as quasi-sovereign nations with the inherent powers of sovereignty, except to the extent that those powers have been taken away from them by the exercise by Congress of its paramount power in the area or by treaty; that the tribal courts are not the creations of the federal Constitution or of federal statutes, and that their jurisdiction is inherent with respect to all matters that have not been taken away from them.

In the leading case of *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which arose in what was then Dakota Territory, and which involved the murder of one Indian by another Indian in the Indian country, the Supreme Court held that the federal court in the Territory had no jurisdiction to try the killer for murder. It was after that decision that Congress passed what is now § 1153 and which vested in the federal courts jurisdiction of certain specific crimes mentioned in the statute. *Keeble* v. *United States*, 412 U.S. 205, 209-12 (1973).

While that statute took away from the Indian tribes and their tribal courts jurisdiction over enumerated offenses, the jurisdiction that was left to them was in our view an inherent and original jurisdiction of quasi-sovereign powers. We hold that a tribal court in administering its residual jurisdiction is not acting as an adjudicatory arm of the federal government, and that it is not simply an inferior court in the federal judicial system.

It is quite true as the Ninth Circuit points out in *United States* v. *Wheeler, supra*, 545 F. 2d at 1257, that the United States has plenary control over the criminal jurisdiction of tribal courts. That does not answer the question. While Congress might deprive the tribal courts of all of their residual jurisdiction to try offenses not punisable under § 1153, it has not seen fit to do so.

From a practical standpoint, the result that appellant would have us reach might mean that the felony jurisdiction conferred on the federal courts by § 1153 could in instances be frustrated by relatively minor prosecutions in the tribal courts. Such a situation would be undesirable and might lead to still further congressional encroachment on the jurisdiction of those courts.

The result here reached is not contrary to the rationale underlying the recent decision in *United States* v. *Antelope*, U.S. , 97 S.Ct. 1395 (1977), holding that § 1153 is not racially discriminatory. Nor is it contrary to the holding in *Keeble* v. *United States*, *supra*, wherein it was held that an Indian charged with a felony under the Major Crimes Act is entitled in an appropriate case to a lesser included offense instruction even though the lesser included offense itself might originally have been within the exclusive jurisdiction of a tribal court.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
DEC 8 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

October Term, 1977

No. 76-1629

United States of America,

Petitioner,

v.

Anthony Robert Wheeler

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA, *Petitioner,*

v.

ANTHONY ROBERT WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX *

	Page
Relevant Docket Entries	1
Criminal Complaints filed in The Trial Court of Navajo Tribe, Judicial District of Chinle, Arizona	7
Judgments and Mittimus of the Trial Court of the Navajo Nation, Judicial District of Chinle, Arizona	9
Indictment, filed May 21, 1975	11
Superseding Indictment, filed November 19, 1975	12
Transcript of Proceedings on Defendant's Motion to Suppress	13
Transcript of Proceedings on Defendant's Motion to Dismiss	25
Order Allowing Certiorari	33

---

* A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was reproduced as Appendix A to the petition for a writ of certiorari (pp. 1a-8a). The judgment of the court of appeals was reproduced as Appendix B to the petition (p. 9a).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cr. 75-550 Pct.

UNITED STATES

v.

WHEELER, ANTHONY ROBERT

Date	Proceedings
11/19/75	1. Superceding Indictment (1 ct). (prev. case No. CR-75-268 Pct. was dismissed on 8/18/75).
11/19/75	— Minute entry: On motion of Govt., Order that a summons be issued ret. at 12:30 p.m. on 12/1/75 in ctrm #3.
11/19/75	— Issue summons to marshal in dup. plus cc to T. Kleinschmidt, atty.
12/1/75	2. Summons returned by certified mail executed.
12/1/75	— Minute entry: On for arraignment. D. Drake pres. for Govt. T. Kleinschmidt pres. for deft. Deft. not present. Order matter be con't until 12:30 p.m. on 12/8/75.
12/8/75	— Minute entry: On for arraignment. D. Drake pres. for Govt. T. Kleinschmidt pres. for deft. Deft. not present. Order arraign. be held before the Magistrate later on today.
12/8/75	3. Order that trial to commence at 9:00 a.m. on 2/3/76 with a jury.
12/8/75	— Mailed cc re above order to U.S. Atty, T. Kleinschmidt & deft.
12/9/75	4. Record of minutes of arraign. held before Mag. Gormley. Deft. pres. & with counsel T. Kleinschmidt. Deft. pleads not guilty. Order pass for trial setting in District Court.

Date		Proceedings
12/9/75	5.	Order specifying methods and conditions of release.
1/15/76	6.	Motion to suppress, set for hearing at 11:00 a.m. on 1/26/76.
1/19/76	7.	Response to motion to suppress statements.
1/26/76	—	Minute entry: Motion to suppress on for hearing. D. Drake pres. for Govt. T. Kleinschmidt pres. for Deft. Deft. not present. Order matter con't until 11:00 a.m. on 2/2/76.
1/28/76	—	Minute entry: The Court today ordered that the motion to suppress, set for 2/2/76 and the trial date of 2/3/76 has been vacated and both are reset for 2/5/76. (counsel notified by phone of changes).
2/4/76	8.	Stipulation that deft. is an indian.
2/4/76	9.	Stipulation that act charged in the indictment happened on the Indian reservation.
2/4/76	10.	Affidavit of indigency.
2/5/76	—	Minute entry: On for motion to suppress. D. Drake pres. for Govt. Deft. Wheeler pres. & with counsel T. Kleinschmidt. (See exhibit and witness list). Order motion is denied. Further ordered that trial date is vacated and Order that this case be dismissed because of double jeopardy.
2/5/76	—	Minute entry: The Court today ordered that doctors Steve Methner and Greg Alexander be paid their travel expenses and witness fees by the marshal. (issued notice to marshal).
2/11/76	11.	Transcript of proceedings on deft's motion to dismiss.
3/4/76	12.	Pltf U.S.A. Notice of Appeal.
3/5/76	—	Copy to: 9th CCA, U.S. Attorney, Probation, U.S. Marshal Magistrate, and Court Reporter.
3/8/76	13.	Designation of record on appeal as to Deft Robert Anthony Wheeler.
3/8/76	—	Copy to: Crt Reporters, U.S. Atty.

Date		Proceedings
3/24/76	14.	Reporter's transcript of proceedings had on February 5, 1976, original and two copies.
3/25/76	15.	Motion of Deft. for leave to take depositions, set for hearing at 11:00 a.m. on 3/29/76.
3/25/76	16.	Pltf. Designation Of Record on Appeal (AMENDED)
3/25/76	—	Copy to: U.S. Atty, U.S. Marshal, Magistrate, Crt Reporter.
3/29/76	—	Minute entry: Motion for leave to take depositions on for hearing. D. Drake pres. for Govt. T. Kleinschmidt pres. for deft. Wheeler. Order motion granted and deposition to be taken at convenience of both counsel.
4/5/76	—	Record on appeal transmitted to Court of Appeals this date.
4/8/76	17.	Notice of taking depositions.
4/19/76	18.	Order for Time Schedule from 9th CCA. Copy to U.S. Atty.
4/23/76	19.	Application for payment of court reporter and transcript costs and Order thereon. (cc mailed to U.S. Atty, T. Kleinschmidt and G. Denney).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1509

The United States of America,
Plaintiff-Appellant:

vs.

Anthony Robert Wheeler,
Defendant-Appellee:

Date	Filings-Proceedings
Apr. 11, 1976	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. —sr—
Apr. 13, 1976	FILED CERT TRNSC RECORD ON APPEAL IN TWO VOLUMES: VOL. I, PLDGS, THREE CERT. COPIES; VOL. II, RPTRS TRNSC, ORIG. & TWO COPIES. ONE ENVELOPE IN LPS.
Apr. 14, 1976	Filed order (C) the parties, counsel and court personnel in the processing of this appeal will comply with the following time schedule: 1) abstract of record, etc. due no later than 4-5-76; 2) Aplt's opening brief due no later than 5-5-76; 3) Aple's brief due no later than 6-4-76; 4) Aplt's final brief due no later than 6-15-76; 5) this case is now calendared for hearing during the week of 8-2-76; —fn—
Apr. 23, 1976	Filed Appellant's motion to supplement record on appeal to "C"
Apr. 29, 1976	FILED ORDER (C) granting aplt. leave to supplement record on appeal. Subject to reconsideration if any objection raised in seven days. —acb—

Date	Filings-Proceedings
May 6, 1976	Rec'd 4 Aplt's Briefs (USA) 5/4/76 insufficient copies. —dmf—
May 6, 1976	FILED CERT SUPPL RECORD ON APPEAL: 13 PGS OF ADDL PLDGS ADDED TO BACK OF VOL. I.
May 12, 1976	Exhibits in LPS sent back to DC per request of DC. —cjb—
May 13, 1976	Filed 25 Aplt's Briefs (USA) 5-4-76 —dmf—
Jun 3, 1976	Filed 4 Aplee's Briefs (6/1/76) aplee in FP —dmf—
Jun 16, 1976	Filed 25 Aplt's Reply Briefs (6/14/76) —dmf—
Nov. 2, 1976	CAUSE ARGUED & SUBMITTED TO: GOODWIN, SNEED, CJJ & EAST, DJ. jlw
Dec. 2, 1976	ORDERED OPINION (SNEED) FILED & JUDG TO BE FILED & ENTD
Dec. 2, 1976	Filed opinion—AFFIRMED
Dec. 2, 1976	Filed & Entd Judgment. —fn—
Jan. 5, 1977	MANDATE ISSUED
Jan. 14, 1977	Received aplt's Petition for Rehearing with Suggestion for rehearing in banc. ec to panel
Jan. 21, 1977	Filed Aplts (USA) motion to extend time for filing petition for rehearing and suggestion for rehearing in banc. to panel bc
Feb. 10, 1977	Filed order (G & S) The motion by aplt U.S. to extend time for filing petition for rehearing and suggestion for rehearing in banc is granted and the Clerk is instructed to file the petition of the aplt U.S. heretofore rec'd by this court. —fn—
Feb. 10, 1977	Filed aplt's petition for rehearing with suggestion for rehearing in banc which was rec'd Jan. 14, 1977. —fn—

Date	Filings-Proceedings
Mar. 23, 1977	Filed order (G & S, CJJ & EAST, DJ) The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected. —fn—
Apr. 18. 1977	Received copy of clerk (S.C.) to Hon. Wade McCree, Sol. General of the U.S., regarding granting of extension to file certiorari. (On 4-13-77 Mr. Justice Rehnquist granted until May 20, 1977 to file certiorari). ogm
May 31, 1977	R'cvd on May 27 '77, Supreme Court notice of filing petition for certiorari on May 20, 1977, assigned no. 76-1629. ogm

---

IN THE TRIAL COURT OF THE NAVAJO TRIBE JUDICIAL DISTRICT OF CHINLE, ARIZONA

No. CL-321-3245-74

Criminal Complaint

The Navajo Tribe,
Plaintiff,

vs.

Anthony Wheeler,
Defendant,

Round Rock, Arizona

The above-named Defendant is charged by this complaint with the Offense of Contributing to DELINQUENCY OF A MINOR in violation of T17, Section 321, Code of the Navajo Tribe, and contrary to the peace and dignity of the Navajo Tribe to wit:

The said Defendant, did on or about the 16 day of October, 1974, within the Jurisdiction of this Court at northwest of LDS church, Many Farms, Arizona,

Willfully and contribute to the delinquency of a minor.

Date: October 18, 1974

Witness to Complainant's Signature
Roger Shirley

Complainant's Signature (or thumbprint)
Bennie Shirley, Lt.

Witness: Laverne Shirley
Many Farms, Arizona

Arraigned: Oct. 18, 1974

Plead: Guilty

Disposition: 60 days or $120.00 @ $2.00 per day.

Judge: H. Bhuhouse

IN THE TRIAL COURT OF THE NAVAJO TRIBE JUDICIAL DISTRICT OF CHINLE, ARIZONA

No. CL-351-3238-74

Criminal Complaint

The Navajo Tribe,

Plaintiff,

vs.

Anthony Wheeler,

Defendant,

C #52678

DOB: 03-21-52

Round Rock, Arizona

The above-named Defendant is charged by this complaint with the offense of Disorderly Conduct in violation of T17, Section 351, Code of the Navajo Tribe, and contrary to the peace and dignity of the Navajo Tribe to wit:

The said Defendant, did on or about the 16 day of October, 1974, within the Jurisdiction of this Court at northwest of LDS Church, Many Farms, Arizona,

Appear in a public place in an intoxicated and disorderly condition.

Date: October 16, 1974

Witness to Complainant's Signature
Roger Shirley

Complainant's Signature (or thumbprint)
Bennie Shirley, Lt.

Arraigned: Oct. 18, 1974

Plead: Guilty

Disposition: 15 days or $30.00 @ $2.00 per day

Judge: H. Bhuhouse

IN THE TRIAL COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF CHINLE, ARIZONA

Judgment and Mittimus

Case No. CL-321-3245-74

The Navajo Nation,

vs.

Anthony Wheeler,

Defendant,

C #52678

Round Rock, Arizona

You, Anthony Wheeler, have pleaded guilty, of the offense of Contributin [sic] to Delinquency of a minor in violation of Title 17 and Section 321 of the Navajo Tribal Code, and in accordance with the mandate of said code, YOU ARE SENTENCED:

To jail for a period of 60 days OR pay a fine of $2.00 per day.

Sentence commences on 10-18-74. Date of release 12-17-74.

You are committed to the custody of the keeper of the Navajo jail at Chinle, Arizona and there to be confined until this judgment has been satisfied.

Dated this 18th day of October, 1974.

Homer Bhuhouse
Judge

MITTIMUS

To: THE KEEPER OF THE JAIL AT CHINLE, ARIZONA.

You are hereby ordered to take and receive and safely keep the person of Anthony Wheeler until (he)(she) has satisfied the above judgment.

Dated this 18th day of October, 1974.

Homer Bhuhouse
Judge

Where sentence is suspended, mittimus is not signed.

All sentences commence at 9:00 a.m. on day of sentence and twenty-four hours are considered one day.

IN THE TRIAL COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF CHINLE, ARIZONA

Judgment and Mittimus

Case No. CL-351-3238-74

THE NAVAJO NATION

vs.

ANTHONY WHEELER,

Defendant,

C #52678

Round Rock, Arizona

You, Anthony Wheeler, have pleaded guilty, of the offense of Disorderly Conduct in violation of Title 17 and Section 351 of the Navajo Tribal Code, and in accordance with the mandate of said code. YOU ARE SENTENCED:

To jail for a period of 15 days OR pay a fine of $2.00 per day.

Sentence commences on 10-18-74. Date of release 11-02-74.

You are committed to the custody of the keeper of the Navajo jail at Chinle, Arizona and there to be confined until this judgment has been satisfied.

Dated this 18th day of October, 1974.

HOMER BHUHOUSE
Judge

MITTIMUS

To: THE KEEPER OF THE JAIL AT CHINLE, ARIZONA.

You are hereby ordered to take and receive and safely keep the person of Anthony Wheeler until (he)(she) has satisfied the above judgment.

Dated this 18th day of October, 1974.

HOMER BHUHOUSE
Judge

Where sentence is suspended, mittimus is not signed.

All sentences commence at 9:00 a.m. on day of sentence and twenty-four hours are considered one day.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY ROBERT WHEELER,

Defendant.

INDICTMENT

CR. 75-268 PCT.

VIO: 18 U.S.C. § 1153 and ARS 13-252

(CIR—Assault)

THE GRAND JURY CHARGES:

On or about the 16th day of October, 1974, in the District of Arizona, on and within the Navajo Indian Reservation, Indian Country, ANTHONY ROBERT WHEELER, an Indian male, did assault Corina Rose Totsonie, an Indian female, not then his wife, with intent to rape said Corina Rose Totsonie.

In violation of Title 18, United States Code, Section 1153 and Arizona Revised Statutes 13-252.

A TRUE BILL

Signature Illegible ....

FOREMAN OF THE GRAND JURY
Dated: May 21, 1975

WILLIAM C. SMITHERMAN
United States Attorney

Signature Illegible ....
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Anthony Robert Wheeler,

Defendant.

SUPERSEDING INDICTMENT

NO. CR. 75-550 PCT.

VIO: 18 U.S.C. § 1153 and § 2032

(CIR—Carnal Knowledge of a Female Under Sixteen Years)

THE GRAND JURY CHARGES:

On or about the 16th day of October, 1974, in the District of Arizona, on and within the Navajo Indian Reservation, Indian Country, ANTHONY ROBERT WHEELER, an Indian male, did carnally know a female Indian named Corina Rose Totsonie, not his wife, who had not then attained the age of sixteen years but was fifteen years of age.

In violation of Title 18, United States Code, Sections 1153 and 2032.

A TRUE BILL

Signature Illegible ....

FOREMAN OF THE GRAND JURY
Dated: November 19, 1975

WILLIAM C. SMITHERMAN
United States Attorney

Signature Illegible ....
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Cr. 75-550 PCT.
WPC

United States of America,

Plaintiff,

vs.

Anthony Robert Wheeler,

Defendant.

TRANSCRIPT OF PROCEEDINGS ON DEFENDANT'S MOTION TO SUPPRESS

BEFORE:

Hon. William P. Copple, Judge
Phoenix, Arizona
February 5, 1976
9:00 a.m.

APPEARANCES:

For the Government:
Mr. Daniel R. Drake
For the Defendant:
Mr. Tom Kleinschmidt

[3] PROCEEDINGS

THE CLERK: Cr. 75-550 Prescott, United States v. Anthony Robert Wheeler, motion to suppress.

MR. DRAKE: Government is ready to proceed, Your Honor.

MR. KLEINSCHMIDT: Defendant is ready, Your Honor.

THE COURT: Is this motion to suppress directed solely to the statement on the Miranda basis?

MR. KLEINSCHMIDT: Yes, Your Honor.

THE COURT: Okay. Call your witness.

MR. DRAKE: Call Bennie Shirley to the stand, please.

BENNIE SHIRLEY,

called as a witness by the Government, being first duly sworn, testified as follows:

THE CLERK: State your name.

THE WITNESS: Bennie Shirley.

MR. DRAKE: Before I start with Mr. Shirley, I'd like to ask Mr. Kleinschmidt if he intends to make a motion to suppress a statement made to Mr. Shirley?

MR. KLEINSCHMIDT: Yes, I do, Your Honor.

[4] DIRECT EXAMINATION

BY MR. DRAKE:

Q Would you state your name and occupation?

A Bennie Shirley, the rank of lieutenant.

Q Calling your attention to October 16 of 1974, were you so employed as a Navajo policeman?

A Yes.

THE COURT: What was that date?

MR. DRAKE: October 16 of 1974.

Q BY MR. DRAKE: Were you on duty that evening?

A No, I was off duty.

Q Did you have occasion to be involved in an investigation of a possible crime?

A Right.

Q Where did this take place?

A Many Farms, Arizona.

Q What did you do with respect to the investigation?

A I responded to the call, but mostly just the surrounding area at the scene where the alleged crime had taken place, I responded to that location.

Q Did you encounter Anthony Wheeler?

A Right.

Q Where did you encounter him?

[5] A At the time I arrived at the scene, he was in the vehicle, pickup truck.

Q And do you recall what type of pickup truck this was?

A It's a green Chevrolet, half-ton pickup.

Q What did you do with respect to Mr. Wheeler?

A At the time I got to the site of the parked vehicle, I saw a head rising, so I know for a fact somebody is in there in the parked vehicle, so I went ahead and investigated.

Then right there I recognized Mr. Anthony Wheeler, I identified him as he pretended to be in a sitting position in the——

Q You say you identified him. Were you familiar with him?

A I am familiar with the person.

Q Did you identify yourself?

A Right, I identified myself as a police officer.

Q Were you in uniform at that time?

A In civilian clothes.

Q What, if anything, was said between you and Mr. Wheeler?

A He didn't say much, kind of mumbled for a [6] while. After I had gotten him out of the vehicle, he did say "I was helping the girl."

Q Was this in response to a question?

A No. I didn't ask him, because I made sure that I identified myself as a police officer and he doesn't have to say anything or doesn't have to make any comments, and right then and there I gave him the rights and identification to make clear that he recognized me as a police officer, too.

So I repeated "My name is Bennie Shirley and I'm a police officer, Mr. Wheeler."

Q Was this before he made the statement or after he made the statement?

A After he made the statement "I was just helping the girl."

Q Did he make the statement again?

A He did repeat it again, "I was just helping this girl."

Q Was this after the rights, then?

A Then afterwards I gave him the rights, I said, "Anthony, you have the right to remain silent and you don't have to tell me anything. I have to make sure that you know you have your rights as an individual, so——"

Q Did he repeat the statement to you after [7] that point?

A He did, he repeated it again, "I was just helping this girl."

MR. DRAKE: Nothing further.

Q Oh, did you make any attempt to interrogate or interview him that day?

A No, because I gave him the rights right then and there, "You have the right to remain silent and you don't have to say anything or you don't have to tell me anything."

Q But did you attempt to interrogate him that evening?

A No, I didn't.

Q What was done with Mr. Wheeler that evening?

A The only thing I mentioned, "I have to place you under arrest for this alleged crime."

Q Was Mr. Wheeler booked into jail that evening?

A Afterwards, he was booked in.

Q And do you know if he saw a magistrate or officer of the court sometime after he was booked in?

A No. He was just booked in.

Q Do you know if he saw one the next day?

A I didn't see him.

[8] THE COURT: Did you have anything else to do with this case after that?

THE WITNESS: I filed a criminal complaint.

THE COURT: Is that all?

THE WITNESS: That's all.

THE COURT: Did you interview the defendant any more after that?

THE WITNESS: No, sir.

THE COURT: Did you ever talk to him about it again after that?

THE WITNESS: No, sir.

MR. DRAKE: Nothing further.

CROSS-EXAMINATION

BY MR. KLEINSCHMIDT:

Q Lieutenant, I understand that he said something, then you advised him of his rights, then he said something again; is that correct?

A He repeated again the same——

Q Did you make a report about this?

A I did make a reporf.

Q Where is your report? Do you have it?

A Just a written statement, that's all.

Q May I see it, please?

(Witness producing document.)

[9] A This is a statement to the investigating officer.

MR KLEINSCHMIDT: May I have this marked, Your Honor?

THE COURT: Yes.

THE CLERK: Defendant's A.

(Defendant's Exhibit A marked for identification.)

Q BY MR. KLEINSCHMIDT: Lieutenant, have you read this report recently?

A Right.

Q It doesn't say anything about him making a statement at all, does it?

A Right. I found out that I left out that particular statement.

Q Did you make a statement to the FBI about this?

A No, just to Mr. Frank Adakai, Agency Special Officer.

Q Did you tell him what you testified here to today, that you made a statement—or that the defendant made a statement and then you advised him of his rights and then he made a statement again?

A Right, he had repeated the——

Q Did you tell that to Mr. Adakai?

[10] A At that time I did not mention that but I did recall that he said "I was only helping the girl." That's about all.

Q When did you recall that he made a statement and then you advised him of his rights and then he made a statement? When did you recall that?

A When he was trying to say that "I was only helping the girl," right there I stopped him from talking to me. That's when I gave him the rights to remain silent.

Q Now, Mr. Wheeler was very, very drunk that night, wasn't he?

A Right.

Q Could he stand up?

A He did stand up.

Q Did he pass out in the police car?

A No, he was getting back to normal.

Q But he was very drunk?

A He was intoxicated.

Q What did he do? How did you know he was intoxicated?

A I could smell the odor of liquor from him, his clothing was disarranged and blood stain on his face, on the cheek, right side.

And then I know for a fact he was under [11] the influence of liquor, smelled liquor, and then the way he appeared, bloodshot eyes, and then I could still—after I got him out of the vehicle, I could still smell intoxicating liquor.

Q And he mumbled, you said earlier that he mumbed his words?

A Right, when he tried to say "I was only helping the girl." I could recall he kept repeating.

Q Did he stagger around?

A He didn't.

MR. KLEINSCHMIDT: Those are all my questions.

THE COURT: Anything else, Mr. Drake?

MR. DRAKE: No, no further questions.

THE COURT: Thank you, Officer Shirley. You may step down.

MR. DRAKE: Call Frank Adakai.

FRANK ADAKAI,

called as a witness by the Government, being first duly sworn, testified as follows:

THE CLERK: State your name.

THE WITNESS: My name is Frank Adakai.

[12] DIRECT EXAMINATION

BY MR. DRAKE:

Q Would you, please, state your name and occupation?

A Yes. My name is Frank Adakai and I am a criminal investigator for the Bureau of Indian Affairs working out of Chinle, Arizona.

Q Calling your attention to October 16 of 1974, Mr. Adakai, did you have occasion to investigate a crime that night?

A Yes, I did.

Q And who was the defendant or suspect in that crime?

A Mr. Anthony Robert Wheeler.

Q Where did you first encounter Mr. Wheeler that evening?

A My first encounter with Mr. Wheeler was at the scene where he was being detained by Lieutenant Bennie Shirley, and that being within the confines of the Many Farms Bureau of Indian Affairs High School compound.

Q Now, what took place when you arrived upon the scene?

A Upon arriving at the scene where Mr. Wheeler was being detained, I noticed that [13] Mr. Wheeler was in a spread-eagle or in a search position, leaning up against the vehicle, and Lieutenant Shirley standing next to him.

Q What, if anything, was said?

A Of course, as soon as I drove up, I immediately recognized Anthony Wheeler because I have known Mr. Wheeler and he has been very close to our family, so right away I did identify him, and as soon as I got out of the vehicle, walked over to where they were, Mr. Wheeler recognized me and greeted me and I did the same thing and, of course, right away I noticed that Mr. Wheeler was intoxicated and his appearance was to the extent where he only had a tee shirt on, a vest-type tee shirt that was torn, one of the shoulder straps was torn.

And, of course, I did receive the report initially of what had happened from Lieutenant Shirley's wife, who was responsible for contacting me at the house.

Q What, if anything, was said upon your arrival at the scene between you and Mr. Wheeler other than the brief hellos or greetings that you exchanged?

A Mr. Wheeler's only comment, he, without being questioned or anything, made a statement, as soon as he saw me arrive there, that he was in the process [14] of assisting the girl who had been attacked by several other boys, and during the process the boys had jumped him and then beaten him up.

Of course, I did not question him that night. Lieutenant Shirley advised me that he was in custody for a misdemeanor offense of disorderly conduct, and like I say, he was intoxicated that night, so I did not question him, I did not talk to him at all.

Q Was he booked into jail that evening?

A He was, yes.

Q Do you know if he was taken before a Magistrate or judicial officer the next day?

A I was busy with the on-the-scene investigation but I know he was in custody, and that is usually the procedure with the police department, that if the judge is there, the tribal judge, then, of course, they are immediately arraigned.

Q Was the tribal judge there the following morning?

A I do not know, sir. Like I say I was out in the field, following up on the investigation.

Q Now, did you have occasion to talk to Anthony Wheeler again?

A Yes. My next encounter with Mr. Wheeler was on October 6th—excuse me—October 17th at [15] 6:00 p.m., when I came back from the field.

Q Where did you encounter Mr. Wheeler?

A Mr. Wheeler was still in custody at the Navajo police jail in Chinle, Arizona.

Q About what time was this?

A 6:00 o'clock.

Q Did you talk to him that afternoon?

A Yes, I did.

Q Where did this discussion take place?

A The discussion took place at the Navajo police building.

Q More particularly, sir, where in the building?

A In one of the offices inside the main building.

Q Who was present during this discussion?

A Mr. Wheeler and myself.

Q And what, if anything, was said at the outset?

A Of course, he knows who I am, but I identified myself again and I advised Mr. Wheeler that I was in the process of investigating a complaint of rape which had been brought to my attention and that I had been out in the field all that day conducting the investigation.

[16] Of course, I explained to Mr. Wheeler that before we talk to anyone who are in the accusatory stage, before we talk to anyone, we usually advise them of their rights. And I had one of the rights forms which I immediately took out and I asked Mr. Wheeler to read it.

Q Did he read it?

A Which he did, and I asked him if he understood. Mr. Wheeler assured me he understood.

I then read the rights form to him in English, and in the process, there were five points that I made sure that he understood.

Q Now, Officer Adakai, was Mr. Wheeler asked to sign this form?

A After he assured me he understood his rights, yes.

(Document handed to witness.)

Q I show you what has been marked now for identification as Government's Exhibit 1.

Is that the form that Anthony Robert Wheeler signed that morning—that afternoon?

A Yes, sir. I have the place where he was contacted, the date of October 16th and, of course, the time at 6:05, Mr. Anthony Wheeler signed it and I affixed my name in the area where it says "witness."

[17] Q Now, did you explain or amplify the rights contained in this document?

A Yes, sir, I did.

Q Now, you say you have known Anthony Wheeler, is that correct?

A Yes, sir.

Q How long have you known him?

A We have known Anthony for about a good three years before this particular incident took place.

Q And did Mr. Wheeler have any trouble or have you had any difficulty speaking with Mr. Wheeler in the past in English?

A No. I know Mr. Wheeler is very fluent in the English language. I know that he understands the language fairly well, because my wife does not speak Navajo and, of course, when he comes to our house, we carry our conversation in the English language and I know he understands English very well.

Q And did Mr. Wheeler give you a statement that day?

A Yes, he did, a verbal statement. This is an unsigned statement.

Q Did you have any difficulty understanding Mr. Wheeler during the conversation?

A No. He expressed himself very well.

[18] MR. DRAKE. Your Honor, I would offer the exhibit marked for identification as Government's 1.

THE COURT: Have you seen it, Mr. Kleinschmidt?

MR. KLEINSCHMIDT: Your Honor, is that——

THE COURT: That is the waiver.

MR. KLEINSCHMIDT. We don't object.

THE COURT: May be admitted for the purposes of this hearing.

(Government's Exhibit 1 received in evidence.)

CROSS-EXAMINATION

BY MR. KLEINSCHMIDT:

Q Mr. Adakai, when you saw Mr. Wheeler on the scene that evening of October the 16th, where was that, again?

A That was within the confines of the BIA high school fenced compound.

Q And that would be northwest of the LDS church at Many Farms?

A That would be, yes, right.

Q Do you have a report you submitted about this incident that occurred, what happened when you went out there to the scene that night?

[19] A It's contained in my investigative report.

Q Do you have that with you?

A Yes.

Q May I see that?

(The witness producing document.)

Now, was he very drunk, Mr. Adakai?

A He was intoxicated.

THE COURT: Wait a minute. At which time?

MR. KLEINSCHMIDT: At the scene.

THE WITNESS: He was intoxicated.

Q BY MR. KLEINSCHMIDT: Now, you saw him the next day at the jail?

A Yes.

Q And you gave him the rights?

A Yes, sir.

Q And then you asked him some questions and he answered them, is that right?

A After he waived his rights, yes.

Q But the statement he gave to you was in response—You asked him questions and he answered them?

A He more or less gave me a narrative account of his activities during that—during the day prior to the incident and leading up to the incident.

[20] Q Did you write everything down that he said?

A What he told me, yes.

Q But you did ask him some questions, didn't you?

A If I recall, his excuse was similar to what he advised me the night before, where he was in the process of assisting the girl and, of course,——

THE COURT: Wait a minute. The question was: Did you ask him any questions, yes or no?

THE WITNESS: Yes, I did.

THE COURT: Okay.

MR. KLEINSCHMIDT: Thank you. Nothing further, Your Honor.

THE COURT: Mr. Drake?

MR. DRAKE: No redirect.

THE COURT: Thank you, Mr. Adaikai, you may step down.

MR. DRAKE: No further witnesses.

MR. KLEINSCHMIDT: We have nothing further on this motion, Your Honor, and we will submit——

THE COURT: What is the basis for your motion?

MR. KLEINSCHMIDT: Well, Your Honor, first of all as to the statements made to Lieutenant Shirley, [21] he made a statement before he was advised of his rights.

THE COURT: I consider that a volunteered statement under the evidence so far. Go ahead.

MR. KLEINSCHMIDT: We have nothing further to submit, Your Honor.

THE COURT: Very well. Motion is denied.

* * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CR. 75-550 PCT.
WPC

United States of America,
Plaintiff,

vs.

Anthony Robert Wheeler,
Defendant.

TRANSCRIPT OF PROCEEDINGS ON DEFENDANT'S MOTION TO DISMISS

BEFORE:

Hon. William P. Copple, Judge
Phoenix, Arizona
February 5, 1976
9:00 a.m.

APPEARANCES:

For the Government:
Mr. Daniel R. Drake
For the Defendant:
Mr. Tom Kleinschmidt

PROCEEDINGS

[2] MR. KLEINSCHMIDT: One further thing, Your Honor. I would like to make another motion, which will just take a minute, and that is a motion to dismiss the indictment on the grounds that this prosecution constitutes double jeopardy. I will put the witness on, if the Government wants.

I have a certified copy of the defendant's conviction and of the complaint filed in the Tribal Court at Chinle.

THE COURT: Why do you wait until today, with a jury waiting outside, to make that kind of a motion?

MR. KLEINSCHMIDT: Your Honor, let me explain this. There was reference in the Government's file to the defendant's arrest. There was no reference at all to any judicial proceedings—or at least none that I saw—to any judicial proceedings on this matter in the Tribal Court. I was unaware of that.

Well, I want to be entirely candid with the Court. I was earlier than this time aware of it only in a very peripheral manner and I did not know that the charge in the Tribal Court constituted the one that we have here today. I found that out later when [3] I made—or this week when I made inquiry to the Tribal Court, itself, and found out that Mr. Wheeler was convicted of contributing to the delinquency of a minor for an incident that occurred at Many Farms northwest of the LDS church on the 16th of October of 1974.

I would say this, Your Honor: There is a difficulty, there is some difficulty, as I'm sure the Court is aware, in communicating with Navajos, and they do not always understand everything that is important in a case.

And I'm sorry it's made at this time, but I think it is a meritorious motion and today is the first day that I had the documents to back the motion up.

THE COURT: Mr. Drake, what do you know about this?

MR. DRAKE: Your Honor, this is the first I've heard of it and I am right now in the process of asking——

THE COURT: If he has been tried on the criminal charge arising out of the same incident, how are you going to avoid a double jeopardy dismissal?

MR. DRAKE: Your Honor, I believe that the elements required and the evidence required for [4] contributing to the delinquency——

THE COURT: That is obviously a lesser included offense, the same facts, the same evidence, the same victim and the same defendant, as I understand it, and if those facts are true, I'm going to have to dismiss it. It should have been determined a long time ago. The prosecution should have determined that before they ever went to the grand jury with an indictment on it, if those facts are true.

MR. DRAKE: I understand that, Your Honor. I again would say that contributing to the delinquency is not necessarily a lesser included offense. I believe such an action can take place if the minor is kept out after curfew, an adult is found with that minor.

THE COURT: Well, now, wait a minute. In this particular case he was charged with what? This was not a curfew violation.

MR. DRAKE: He was charged with contributing to the delinquency.

THE COURT: Under the same facts as alleged in your indictment, right, the same indictment?

MR. DRAKE: Yes, I would submit it is the same indictment.

THE COURT: Then how are you going to get away from it? He has already been tried and [5] convicted for a crime arising out of the same indictment and it is a lesser included offense in your carnal knowledge indictment. It's like trying a man for second degree murder and then turning around and trying him for first degree murder for the same thing. Would you do that?

MR. DRAKE: I would not do that, no.

THE COURT: Then how are you going to distinguish it, Mr. Drake?

MR. DRAKE: I would have to check the facts a bit more than I have had an opportunity at this point, Your Honor. I would ask a brief recess so that I might converse with Mr. Adakai and Mr. Shirley, the officers involved, and also Mr. Kleinschmidt as to the certified copies. The only ones I've seen here refer to disorderly conduct.

THE COURT: I imagine Mr. Adakai has some familiarity with it, I would think.

MR. DRAKE: I would also like a chance to see the statute involved, to see what elements are required for that.

THE COURT: It's not a case of what elements are required [illegible] this particular thing so much as it is did the same physical acts and facts—were they the basis for the conviction in that case.

[6] There are different elements in first degree and second degree murder, Mr. Drake, but you certainly wouldn't quarrel with the fact you can't try a man, convict him of second degree murder and turn right around and retry him for first degree murder, even though the elements are different.

MR. DRAKE: That's true, Your Honor. I would like an opportunity to look at it and see what is involved. I realize it grows out of the same incident, might require different evidence—with the Court's approval.

THE COURT: Well, frankly, I think you are out of business. We will take a recess until 10:30. Tell Jones to divert the jury and tell them to come back at 11:00 o'clock, and as soon as you get the courtroom cleared, round everybody up and tell Lee to bring this other jury back in.

MR. KLEINSCHMIDT: Your Honor, while the Court is still in session, may we put this in evidence (indicating)?

THE COURT: Yes, it may be admitted as Defendant's—whatever it is.

MR. KLEINSCHMIDT: Is a certified copy sufficient, Your Honor?

THE COURT: They are sufficient for me, [7] unless there is some reason to doubt it shown by the Government and Mr. Adakai.

MR. DRAKE: I have no reason at this point, Your Honor. I may have to later investigate.

THE COURT: You better see what you can find, but I think you just finished your case.

(Defendant's Exhibit B marked for identification and received in evidence.

(Recess.

(Further proceedings in open court, the defendant and both counsel present:)

THE COURT: What did you find, Mr. Drake?

MR. DRAKE: Your Honor, we are faced with two major things. First of all, there is not an identity of sovereignties between the Navajo Tribal Courts and the courts of the United States. Much as an individual could be tried in the state court in Arizona for theft of property and be prosecuted in the federal court for interstate transportation of that same property, I submit——

THE COURT: Well, now, wait a minute. Those are two different sets of facts arising out of both the theft and the interstate deal, and I'm not so sure that you are on good ground there, anyway. The difference in sovereignty makes no difference. The [8] double jeopardy attaches whether it is state or federal. If you are tried on the same thing in one court, you cannot then be tried on the same thing in the other court.

Here you have got a clear lesser included offense arising out of the same charge.

MR. DRAKE: Your Honor, I don't have too much research on that point. However, I would point out——

THE COURT: Did you do any?

MR. DRAKE: Yes, I did.

THE COURT: What did you find?

MR. DRAKE: All right. On that first point I raised, I would refer the Court to U.S. vs. Lanza, 260 U.S., 377.

THE COURT: What does it say that is pertinent?

MR. DRAKE: It's saying that there is not an identity of sovereignties; therefore, double jeopardy does not necessarily attach.

THE COURT: Are you telling me that a man can be tried for murder in state court and acquitted and then turn around and retried, if there is a jurisdictional basis for it, in federal court, and the mere fact they are in two different sovereignties [9] eliminates the constitutional guarantee against double jeopardy? Is that what you are trying to tell me?

MR. DRAKE: No. The situation that you posed involves a determination of the facts favorable to the defendant, and under Ashe v. Swenson, another Supreme Court case, the individual acquitted in state court could not be retried in federal court.

THE COURT: How about a man who is convicted in Tribal Court and then being retried in federal court for a greater offense arising out of the same act?

MR. DRAKE: All right. The same act or same transaction is not the governing test as far as double jeopardy is concerned. Ashe v. Swenson in the dissenting opinion made some mention of a same-transaction test. However, that's never been adopted by the Supreme Court.

I would point out that the Second Circuit has specifically rejected such a same-transaction test, and so has the——

THE COURT: But under what legal proceedings factually?

MR. DRAKE: In the Second Circuit opinion, it is U.S. vs.

Cioffi, and that appears at 487 F. 2d, 492. That was an appeal from the judgment of the [10] District Court of the Eastern District of New York.

Now, it was somewhat different there, but they addressed the double jeopardy question and pointed out that "The true test remains that the formulation was stated back in 1871 that the evidence required to support a conviction upon one of them . . .", the indictment or allegations here, ". . . would have been sufficient to warrant a conviction upon the other"; in other words, the same-evidence test. They went on to speak to that further.

Well, let me go on to the other one. This is an Eighth Circuit opinion, Moton v. Swenson, citation on that is 488 F. 2d, 1060, and in this case it was a habeas corpus writ that came up and there the appellant argued that the separate charges arising out of the same episode must be tried together or, in essence, that they must involve the same offense and a determination of one is a determination of both.

The court went on to reject that and said "We do not believe that the same-evidence test for the offense has been supplanted by the same-transaction test, the former remaining the test to be applied save under such circumstances as may fairly come within the collateral estoppel doctrine of Ashe v. Swenson."

Ashe v. Swenson again is a situation we [11] posed earlier where a man was acquitted in state court on a murder and then retried subsequently in another court.

Now, I would point out that Cioffi, the Second Circuit opinion, has gone up on certiorari and cert. was denied. So, basically what I'm saying to the Court at this time is that the same-evidence test does not preclude the proceeding here in this court.

In specific I would refer to the portion of the Navajo Tribal Code as cited in the complaint to which Anthony Wheeler entered a plea. That was Section 321 of Title 17, and that appears in a subchapter under the title "Children", and the specific section is titled "Contributing to the delinquency of a minor."

Now, there is no distinct definition pointed out that I was able to find in Title 17, criminal (sic) section, of the term "Contributing to the delinquency of a minor." However, looking to other subsections or sections within the subchapter "Children", one finds "curfew" a definition of "abroad" and exceptions to that, penalties to be imposed upon one who allows their child to——

THE COURT: All of that is clearly immaterial to the case here. My question is that what he pled guilty to was the same act, that is, the same [12] assault, whether termed rape or not, but the same event, the same victim, the same night, the same thing.

MR. DRAKE: All right.

THE COURT: This was not a curfew case, I don't believe.

MR. DRAKE: No, and I would point out to the Court, under a subchapter of the Tribal Code entitled "assaults", there appears a section 273, "Indecent assault on child", referring to "Any Indian who shall assault a child under the age of 18 years and take indecent liberties on the person of such child with or without the child's consent shall be deemed guilty of this offense." And I would submit to the Court that that is what Mr. Kleinschmidt hopes that the contributing to the delinquency of a minor charge is.

THE COURT: Mr. Kleinschmidt?

MR. KLEINSCHMIDT: If it please the Court, first I would like to say that the Defendant's Exhibit B is, inadvertently, a simultaneous conviction for disorderly conduct, and I meant and would now like to have these marked. They are certified copies of the conviction for contributing to the delinquency of a minor, if they can be marked as Defendant's C.

(Defendant's Exhibit C marked for identification.)

THE COURT: Okay.

[13] MR. KLEINSCHMIDT: Your Honor, Mr. Drake makes a point that, in the Tribal Code, contributing to the delinquency of a minor is not a very distinct charge, and that is true. Then he goes on to say that because the defendant was charged with something—could have been charged with something else and wasn't, that this isn't the same offense.

The point is that the—it makes very clear as to time and place and exactly what the situation was with the defendant. He was convicted. He pled guilty to a lesser included offense of exactly what he is charged with here, and I submit that it is double jeopardy.

[13] THE COURT: I think that it has come up in another division of the District Court before in the exact same circumstances and the exact same double jeopardy was held. I think it was one of your cases, in fact, a few years back.

MR. KLEINSCHMIDT: Your Honor, I know on varying facts it has been in this court, in the District Court at Phoenix, and such a motion has been both granted and denied in Judge Craig's court. Neither was my case, but when it was denied, it was on a different set of facts, is my understanding. There was factually quite a disparity between what the [14] defendant—or the circumstances under which he pled guilty in the Tribal Court and here.

I am aware of a case of Mr. Karas' in Judge Craig's court where the charge was assault with a dangerous weapon or one of the assault charges in the federal court, and the defendant had pled guilty to disorderly conduct in the Tribal Court and it was shown that that disorderly conduct was the assault which the defendant was charged with in the federal court, and under those circumstances I am aware of the dismissal.

THE COURT: That was the one that I had in mind and it was dismissed on a double jeopardy basis.

MR. KLEINSCHMIDT: Yes, Your Honor.

THE COURT: Well, I don't think the Court has any choice in the matter. The indictment will be dismissed on the basis that the defendant has already once been placed in jeopardy for the same offense.

(Proceedings concluded.)

Supreme Court of the United States

No. 76-1629

UNITED STATES,

Petitioner,

v.

ANTHONY ROBERT WHEELER

ORDER ALLOWING CERTIORARI. Filed October 3, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth .... Circuit is granted.

JUL 22 1977
MICHAEL RODAK, JR., CLERK

NO. 76-1629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, Petitioner

-vs-

ANTHONY ROBERT WHEELER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Anthony Robert Wheeler, pursuant to Rule 53, Supreme Court Rules, and Title 18 U.S.C. §3006A(d)(6), respectfully moves this Honorable Court for leave to file the attached Memorandum of the Respondent in Opposition to the Petition of the United States of America for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent the respondent in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: July 20, 1977.

Tom O'Toole
TOM O'TOOLE
Federal Public Defender
District of Arizona
U. S. Court House
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (FTS: 261-3561)

NO. 76-1629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, Petitioner

-vs-

ANTHONY ROBERT WHEELER

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM OF THE RESPONDENT IN OPPOSITION

TOM O'TOOLE
Federal Public Defender
District of Arizona

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1629

UNITED STATES OF AMERICA, Petitioner

-vs-

ANTHONY ROBERT WHEELER

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is United States v. Wheeler, 545 F.2d 1255 (9th Cir., 1976). It is also Appendix A of the government's Petition.

QUESTIONS PRESENTED

Whether the Double Jeopardy clause of the Fifth Amendment bars federal prosecution of an Indian defendant for violation of the Major Crimes Act (18 U.S.C. 1153) because of his earlier conviction in Indian tribal court of a lesser included offense arising from the same acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent adopts the Constitutional and Statutory Provisions cited by the government in its petition (Pet. 2-3). Also involved in this case is the

Tenth Amendment to the Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

REASONS FOR DENYING THE PETITION

A. INDIAN TRIBES ARE NOT STATES

As this Court observed in Abbate v. United States, 359 U.S. 187 (1959), State courts obtain their general sovereign powers to govern and to make acts criminal from the Tenth Amendment. Id., 193. The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The dual sovereignty exception to the Double Jeopardy guarantee has been recognized by this Court to be applicable only in the federal-state context. This is supported by both Grafton v. United States, 206 U.S. 333 (1907), where this Court prohibited the prosecution in a United States territorial court of a defendant who has been tried for the same acts in a federal military court and by Waller v. Florida, 397 U.S. 387 (1970), where dual prosecutions in municipal and State courts were prohibited. Both Waller and Grafton reason that dual prosecution is prohibited under the Double Jeopardy guarantee because the defendants are subjected to successive trials in courts of a single sovereign. Waller v. Florida, pp. 394-395, supra; Grafton v. United States, pp. 352, 354-355, supra.

One of the more striking and analogous examples of the limited state-federal application of the dual sovereignty exception to the Double Jeopardy guarantee is the refusal of this Court to apply it to the Commonwealth of Puerto Rico, Puerto Rico v. Shell Co., 302 U.S. 253 (1937), which has a "... degree of autonomy and independence normally associated with States of the Union ..." Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976). In Puerto Rico v. Shell Co., supra, this Court held that the Sherman Anti-Trust Act did not preclude Puerto Rico from adopting and enforcing their own anti-trust laws. The Court rejected the argument that such legislation would be contrary to the Double Jeopardy clause for the reason that both Puerto Rican and federal courts are "creations emanating from the same sovereignty". 302 U.S. at 264. Viewing the dual sovereignty exception in this context, the Court of Appeals was correct in refusing to extend the doctrine to Indian tribes because "Indian tribes are not States". United States v. Wheeler, 545 F.2d 1255, 1258 (9th Cir., 1976); Petition, Appendix A. [1/]

The few cases that turn on this issue support the Court of Appeals conclusion that the dual sovereignty doctrine does not apply to tribal-federal court prosecutions and that it is given only narrow application. [2/] See United States v. LaPlant, 156 F.Supp. 660 (D.C. Mont., 1957), where a motion to dismiss was granted by the District Court for the reason

---

1/ The concept that Indian tribes are analogous to territories and that punishment of an Indian under tribal law bars the subsequent prosecution in the federal court has also been recognized by the United States Department of Interior in its publication Federal Indian Law (1958): "In effect, then, an Indian tribe bears a relation to the Government of the United States similar to that which a Territory bears to such Government, and similar again to that relationship which a municipality bears to a State." (p. 450).

2/ This Court's decision in Abbate v. United States, supra, and the companion case of Bartkus v. Illinois, 359 U.S. 121 (1959) were the subject of vigorous dissenting opinions. In Bartkus, Mr. Justice Black, after tracing the history of the Double Jeopardy clause and stressing the unfairness of multiple trials for the same acts, stated that, "[w]e should, therefore, be suspicious of any supposed 'requirements' of 'federalism' which resulted in obliterating ancient safeguards." 359 U.S. at 155.

that the defendant would be placed in double jeopardy if prosecuted for the included offense of simple assault in the United States Commissioner's Court after being convicted in tribal court of assault and battery arising out of the same incident, and Colliflower v. Garland, 342 F.2d 369 (9th Cir., 1965), cited with approval in Wheeler, p. 1258, supra, where the Court, after a thorough review of the history of tribal courts, observed that the theory of independent tribal sovereignty was a "pure fiction" and that the tribal court was, at least in substantial part, a creature and arm of the federal government. Id., 378-379. But see dicta in United States v. Kills Plenty, 466 F.2d 240 (8th Cir., 1972), that tribes are not arms of the federal sovereign.

That there are few cases squarely dealing with the issue of dual tribal-federal court prosecution infers that the issue is settled and negates the petitioner's claim that failure to apply the dual sovereignty exception to tribal-federal court prosecutions will result in "... the serious impairment of federal prosecutorial authority ...", or cause the "... severe curtailment of the jurisdiction of tribal courts ..." (Pet. 10) [3]

The Court of Appeals was therefore correct when it stated that this Court:

> "... has construed its 'dual sovereignty' rationale narrowly and has never applied it outside of the federal court or state court context ... [and that] Indian tribes are not states". United States v. Wheeler, 545 F.2d at 125, 1258.

---

[3] See the thorough and correctly reasoned dissent in United States v. Kills Plenty, 466 F.2d at 244-248, which rejects the government's contention that tribal courts are arms of separate sovereigns and are therefore analogous to State and federal courts.

B. TRIBAL AND FEDERAL COURTS ARE ARMS OF THE SAME SOVEREIGN

Contrary to the petitioner's urging, tribal courts are an "arm of the federal sovereign" (Pet. 15) and tribal self government is not derived from an "unextinguished residuum of the tribe's ancient sovereignty". (Pet. 11). Indian tribes do not exist in the general and territorial sense like States and have no inherent title to their lands. Instead, the tribes exist only to effect the intent of Congress that they be allowed to maintain their tribal integrity and identity through Congressionally sustained self government. As this Court recognized in Johnson v. McIntosh, 21 U.S. 543, 573-574, 587-588 (1823) and Cherokee Nation v. Georgia, 30 U.S. 1, 16-17 (1831), the international law doctrines of discovery, conquest, session, treaties and history support the conclusion that the United States obtained title to the continent, that the United States has the sole right to eliminate Indian occupancy either by purchase or by conquest and that such title is not subject to judicial review. 21 U.S. at 587-589. As such, Indian tribes exist only by virtue of the laws and treaties of the United States -- having no inherent right of self government and no absolute or aboriginal title to their lands in the absence of Congressional approval. See United States v. Kills Plenty, (Heaney, J., dissenting) pp. 244-248, supra. [4]

In Winton v. Amos, 255 U.S. 373, 391 (1921), this Court recognized that the federal government has plenary powers over tribal courts. At page 17 of its Petition the government recognizes that Congress has plenary powers over

---

[4] Martone, American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?, 51 Notre Dame Law. 600, 625-626. This definitive article traces the history of Indian tribes and concludes that they are not inherently sovereign.

Indian tribes. Yet at page 7 of the Petition it makes the apparently inconsistent argument that "federal authorities [Congress] would be virtually powerless" to remedy the possibility of large numbers of Indians avoiding federal court Major Crimes Act prosecution by subjecting themselves to prosecution in tribal court for a lesser offense. That this plenary power is pervasive and includes tribal courts is evident from a review of Title 25 of the United States Code. Under 25 U.S.C. §476, the very power of Indian tribes to adopt a constitution and by-laws is created. Under 25 U.S.C. §636, the Navajo Tribal Constitution is authorized. Under both statutes the tribes are required to obtain approval from the Secretary of the Interior of its constitution and subsequent amendments thereto. The Navajo Tribal Code under which the respondent was prosecuted for disorderly conduct was adopted by the tribe under the authority of 25 CFR §11.1(e), which requires the specific approval of the Secretary of the Interior. Under 25 U.S.C. §477, the Secretary of the Interior is also authorized to issue corporate charters to various tribes; under 25 U.S.C. §13, Congress authorizes the B.I.A. to expend money for the employment of Indian police and judges; and under 25 U.S.C. §200, a tribe is required to report to the superintendent of the reservation whenever an Indian is incarcerated on the reservation. 5/

That Congress has paramount and complete authority to deal with Indian tribes was again recognized in 1871, when

---

5/ In addition, although the petitioner notes that Indian tribes are treated in the United States Constitution in pari materiae with States and foreign nations, Article I, Section 8, Clause 3 of the Constitution (Pet. 10), in 1831 it was recognized that Indian tribes are not to be treated as foreign nations. Cherokee Nation v. Georgia, p. 18, supra. See also Montoya v. United States, 180 U.S. 261 (1901) ("The North American Indians do not and never have constituted 'nations' ..." Id., 265).

the Congress unilaterally changed Indian policy:

> "Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty ..." (25 U.S.C. §71; originally 16 Statute 544 (1871).

In 1890, shortly after this Court said in United States v. Kagama, 118 U.S. 375 (1886), that there are only two sovereign entities within the United States, the federal government and the States, Id. 379, the Court rejected a tribal claim that it was sovereign and that Congress therefore had no power to take tribal land by eminent domain. The Court said:

> "The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that the nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this Court, or in the acts of Congress defining the relations of that people with the United States." Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 641, 653 (1890).

The Court also noted that members of Indian tribes were "wards of the United States, and directly subject to its political control". Id., 647.

The petitioner incorrectly relies on Talton v. Mayes, 163 U.S. 376 (1896) as an example of the broad inherent sovereignty of tribes which therefore makes them analogous to States. In Talton, the Court held that a five man tribal grand jury could properly indict a tribal member for murder occurring on the reservation since the Bill of Rights and the Fifth Amendment acted as a limitation only on the powers of the federal government, not those of the States or Indian tribes. In view of the subsequent enactment of the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et seq., subjecting tribal members to nearly all of the restrictions of the Bill of Rights that are imposed upon federal and state governments, this argument must fail. In addition, it is significant to note that in Talton the Court dispelled the petitioner's analogy of State and tribal sovereignty when it stated:

> "By treaties and statutes of the United States the right of the Cherokee nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized." Id., 379-380 (Emphasis added)

The petitioner is therefore incorrect in urging (Pet. 15) that the dicta of Talton supports the proposition that tribal autonomy is presently substantial because the Fifth Amendment to the Constitution does not apply to tribal judicial proceedings.

A review of this Court's recent treatment of tax disputes between the States and Indian tribes shows that the concept of Indian tribes as separate, although dependant nations, is no longer viable. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), the Court observed that the Indian sovereignty doctrine first advanced in Worcester v. Georgia, 6 Pet. 515, 557 (1832), as a barrier to the "... State's efforts to extend its criminal jurisdiction to reservation lands ..." was also the same doctrine and rationale that had previously been applied to restrict "... state taxation within the reservation ...", McClanahan, p. 169, supra. However, the Court then recognized that Indian tribes are still:

> "... a 'people distinct from others' ... [only] ... [i]f the tribal organization ... is preserved intact, and [is first] recognized by the political department of the government as existing ... [and that tribes are] ... to be governed exclusively by the government of the Union". Id., 169

The Court noted that:

> "[t]he [tribal sovereignty] doctrine has undergone considerable evolution ..." Id., 171 [and]
>
> ... the modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power." Id., 172.

Instead of relying on the notion of tribal sovereignty as a source of federal authority over Indian matters, the Court instead invoked the federal pre-emption doctrine [6/] and resolved the dispute by examination of the relevant treaties and statutes. The Court noted that:

> "[t]he extent of federal pre-emption and residual Indian sovereignty in a total absence of federal treaty obligations of legislation is therefore now something of a moot question. (citations omitted)." Id., 172, n. 8 (Emphasis added)

It is also significant that in McClanahan this Court recognized that the Navajo Tribe, in whose court the respondent was prosecuted, exists not as a sovereignty but only as an instrument and creation of the United States Government. In reviewing the 1868 treaty between the Navajos and the federal government this Court noted that:

> "... the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions." Id., 174.

The Court then quoted from the Arizona Enabling Act, 36 Statute 569, which states that the tribe and its lands, until extinguished:

> "... shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Id., 175.

[6/] See Oliphant v. Schlie, p. 1015, cited at page 12 infra, and authorities cited therein discussing the application of the pre-emption doctrine to Indian tribes.

Implicit in the Court's holding was the recognition that the federal government has paramount and exclusive control of the Indian tribes and that the inherent sovereignty doctrine was in the past used only to resolve State-tribal disputes. Contrary to the petitioner's contention, this Court has always recognized that tribes are "instrumentalities of the federal government". (Pet. 13).

In Keeble v. United States, 412 U.S. 205 (1973), this Court again minimized the government's claim, similar to petitioner's contention in this case (Pet. 15), that under the teaching of Worcester v. Georgia, 6 Pet. 515 (1832), Ex Parte Crow Dog, 109 U.S. 556 (1883) and Talton v. Mayes, 163 U.S. 376 (1896), Indian tribes possess inherent exclusive jurisdiction to punish tribal criminal violations and therefo

> "[t]he interests of an individual Indian defendant in obtaining a jury instruction on a lesser included offense must fall before the Congressionally sanctioned interests of the tribe in preserving its inherent jurisdiction." Id., 209.

The Court noted that in 1885, when it enacted the Major Crimes Act, Title 18 U.S.C. §1153 and 3242, Congress rejected this doctrine as being "either non-existent or incompatible with principles that Congress thought should be controlling". Id., 210. Instead of this doctrine, the Court relied on the language, purpose and legislative history of the Act in holding that an Indian prosecuted under the Act is entitled to a lesser included offense instruction though such an offense is not found in the United States Code. Id., 210-214.

The petitioner's reliance on United States v. Mazurie, 419 U.S. 544 (1975) (Pet. 11-12), in support of its argument that Indian tribes are sovereigns in the state-federal sense again reflects an incorrect view and misleading application of the notion of inherent tribal sovereignty. In Mazurie, this Court held that under Article I, Section 8(3) of the Constitution, and under the Congressional definition of "Indian Country", Title 18 U.S.C. §1154, Congress, not Indian tribes, has the inherent and complete power to control the sale of alcoholic beverages within Indian Country; Indian tribes are entities only in the sense that they have been delegated authority by Congress to control their internal affairs. Id., 553-557. Although the Court recognized that tribes have "attributes of sovereignty" and "possess a certain degree of independent authority over matters that affect the internal social relations of tribal life", Id., 557, it nevertheless refrained from reliance on any broad concept of inherent independent authority of the tribe over its internal affairs:

> "[w]e need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance Number 26 [requiring a state and tribal license to sell liquor within Indian Country]". 419 U.S. at 557.

A comparison of the definition of the separate sovereign concept of Indian tribal courts applied by the Ninth Circuit in Oliphant v. Schlie, 544 F.2d 1007 (9th Cir., 1976), cert. granted sub nom. Oliphant v. The Squamish Indian Tribe, et al., ___ U.S. ___ (No. 76-5729, June 13, 1977), and in this case supports the conclusion that the definition applied in Oliphant is different from that rejected by the Ninth Circuit and urged by the petitioner in this case. In Oliphant, the Ninth Circuit said that inherent tribal sovereignty exists only as it pertains to internal tribal affairs and only to the extent that it has not been pre-empted or eliminated by federal treaty, statute, policy or tribal law pertaining to the tribe at issue. 544 F.2d at 1010-1014. However, in this case the petitioner urges application of a concept of inherent sovereignty analogous to the sovereignty enjoyed by states under the Tenth Amendment. The petitioner applies to all Indian tribes regardless of limitations imposed by applicable treaties, statutes and tribal laws. The petitioner fails to recognize that in Oliphant and this case the Ninth Circuit was dealing with significantly different definitions and applications of the concept of inherent tribal sovereignty. Any inconsistency in decisions of the Ninth Circuit merely flows from the failure of the Court in Wheeler to point out that Oliphant involved an entirely different issue. [7]

C. THE DOUBLE JEOPARDY GUARANTEE BARS DUAL PROSECUTION OF A GREATER OFFENSE AND A LESSER INCLUDED OFFENSE IN COURTS OF THE SAME SOVEREIGN.

Petitioner did not have the benefit of this Court's recent decisions in Jeffers v. United States, ___ U.S. ___ (No. 75-1805, June 16, 1977) and Brown v. Ohio, ___ U.S. ___ (No. 75-6933), June 16, 1977, when it filed its petition. These cases, as well as Waller v. Florida, supra, soundly reject the claim of the petitioner that:

> "... it does not violate the Double Jeopardy Clause to prosecute a defendant for a greater offense after having successfully prosecuted him on a lesser included offense, so long as he was not in jeopardy of the greater offense at the first trial and is not placed in jeopardy again on the lesser included offense at the second trial. See Diaz v. United States, 223 U.S. 442, 449." (Pet. 20)

---

[7] In Oliphant, the dissent concluded that a presumption in favor of inherent tribal sovereignty no longer exists. 544 F.2d at 1019. Based upon an absence of any cases on the issue for over 100 years and from a thorough review of Congressional action and the legislative history of federal criminal laws pertaining to Indians, the dissent stated that the concept of tribal sovereignty is used only in "... determining the extent to which states can properly exercise jurisdiction where the federal government has decreed a measure of autonomy for the tribes. Martone, American Indian Tribal Self Government in the Federal System: Inherent Right or Congressional License?, 51 Notre Dame Law. 600, 627 (1976). The term 'sovereignty,' then, is merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs. Id., at 629-31; See McClanahan v. Arizona State Tax Commission (citations omitted)." 544 F.2d at 1015.

In Brown, this Court recognized that Double Jeopardy bars dual prosecution for greater and lesser included offenses, no matter which prosecution first occurs. Brown v. Ohio, slip op. p. 7-8. The Court then distinguished Diaz v. United States, supra, from the facts of this case when it said:

> "An exception [to the Double Jeopardy guarantee] may exist where the State is unable to proceed on the more serious charge at the outset [of the trial on the lesser charge] because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See Diaz v. United States, 223 U.S. 442, 448-449 (1912); Ash v. Swenson, 397 U.S. 436, 453, n. 7 (1970) (Brennan, J. concurring)." Brown v. Ohio, slip op. p. 8, n. 7, supra. See also Jeffers v. United States, slip op. p. 13, supra.

Unlike Diaz, there is no evidence in this case that the government lacked facts necessary to sustain the lesser charge when the respondent was prosecuted on the greater charge. Assuming arguendo that the Diaz exception does apply to this case its availability to the government is an additional reason for rejecting the government's claim that the dual prosecution exception to the Double Jeopardy guarantee should be applied to tribal-federal court prosecutions.

The government's argument must also fail in view of this Court's holding in Waller v. Florida, supra, that because they are the same sovereign, prosecution in a municipal court bars prosecution in a state court for the same conduct. Waller implicitly rejects the petitioner's claim (Pet. 19-20) that merely because the respondent could not be put in jeopardy in the tribal court for the same offense (statutory rape) or in the federal court for the same tribal violation (contributing to the delinquency of a minor) an exception to the Double Jeopardy guarantee exists.

The petitioner is also incorrect in claiming that the District Court "... lack[s] independent jurisdiction over the [contributing to the delinquency of a minor] offense ... [and only] ... if the defendant requested such a charge upon the authority of Keeble v. United States [412 U.S. 205] ..." (Pet. 21, n 17) could the charge be considered in the District Court. As this Court noted in Keeble, whereit authorized the District Court to give a state lesser included offense instruction because such a violation did exist in the United States Code, under the principal of mutuality both the federal prosecutor and the defendant are entitled to a lesser included offense instruction where the evidence warrants such an instruction. In other words, each party is entitled to ask for it. Keeble v. United States, 412 U.S. 205 at 208, 214, n. 14. Accordingly, the petitioner's claim that the "respondent would not again be in jeopardy for the tribal offense during his federal trial, since the federal court has no jurisdiction over offenses listed in the Navajo Tribal Code" must fail. (Pet. 21). [8]

---

[8] This argument was criticized when it was raised in the state-federal dual prosecution context. In Abbate v. United States, supra, Mr. Justice Black dissented and said: "The Court today seems to rely on the argument, also made in Lanza, 260 U.S., at 385, that failure to allow federal prosecutions after state [tribal] trials might endanger federal law. States [tribes], the argument runs, might establish minor punishments for conduct which violates United States Statutes. Criminals could then plead guilty in State [tribal] courts and be safe from federal justice ... As we pointed out in Bartkus v. Illinois, ante, p. 150 (dissenting opinion), if Congress has power to make certain conduct a federal crime, it also has power to protect the national intereest. It can take exclusive jurisdiction over the crime, or, if it wishes to allow the States [Indian tribes] concurrent power, it can define the offense and set minimum penalties which would be applicable in both State [tribal] and federal courts. In addition, should the State [tribal] trial prove to be a sham, it might be that no jeopardy could be shown and that a subsequent federal trial would be constitutiona. (citations omitted). It therefore appears that federal laws can easily be safeguarded without requiring defendants to undergo double prosecutions." 359 U.S. at 202-203, n. 2.

CONCLUSION

The petition for a writ of certiorari should be denied. To extend the dual sovereignty rationale adopted by this Court in the federal-state context, Abbate v. United States, supra, to the tribal-federal context is unsupported by either history, treaties, statutes or case law. The proper remedy, should such a problem actually exist, is legislative and not judicial.

Respectfully submitted: July 20, 1977.

Tom O'Toole

TOM O'TOOLE
Federal Public Defender
District of Arizona
U. S. Court House
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (FTS 261-3561)

NO. 76-1629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, Petitioner

-vs-

ANTHONY ROBERT WHEELER

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

AFFIDAVIT OF SERVICE

TOM O'TOOLE, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of the following documents on the United States Attorney for the District of Arizona, Phoenix, Arizona, and has forwarded by air mail a copy of the same documents to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 20th day of July, 1977:

(1) Motion for Leave to Proceed in Forma Pauperis;
(2) Memorandum of the Respondent in Opposition; and
(3) Affidavit of Service.

Tom O'Toole
TOM O'TOOLE
Federal Public Defender
District of Arizona

SUBSCRIBED AND SWORN to before me this 20th day of July, 1977.

Marcia D. Gaudioso
Notary Public

My Commission Expires:
June 14, 1981

FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1629

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

STEPHEN R. BARNETT,
Deputy Solicitor General,

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General,

JEROME M. FEIT,
MICHAEL W. FARRELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below ... 1

Jurisdiction ... 1

Question presented ... 2

Constitutional and statutory provisions involved ... 2

Statement ... 3

Summary of Argument ... 6

Argument ... 12

The Double Jeopardy Clause does not prohibit prosecution of an Indian defendant in a federal court because of his prior conviction in an Indian tribal court of a lesser included offense arising from the same acts ... 12

A. The Double Jeopardy Clause does not bar successive prosecutions by separate sovereign governments for the same offense ... 12

B. The dual sovereignty principle applies to permit successive prosecutions by an Indian tribe and the federal government ... 17

1. The Indian tribes possess attributes of sovereignty from which their authority is derived independently of the federal government ... 17

Argument—Continued Page

2. Failure to apply the dual sovereignty principle to successive prosecutions by tribal and federal courts would lead to "undesirable consequences" of the same kind that the principle, as applied in the federal-state context, was designed to avoid 35

C. Even if tribal courts are viewed as arms of the federal sovereign, the Double Jeopardy Clause does not bar prosecution for a Major Crimes Act felony in a federal district court after conviction of a lesser included offense under tribal law in a tribal court 43

Conclusion 52

CITATIONS

Cases:

Abbate v. *United States*, 359 U.S. 187 ..... 5, 6, 7, 13, 14, 15, 16, 36, 39, 43
Ashe v. *Swenson*, 397 U.S. 436 ..... 45, 49
Barta v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 20
Bartkus v. *Illinois*, 359 U.S. 121 ..... 6, 13, 14, 16
Brown v. *Ohio*, No. 75-6933, decided June 16, 1977 ..... 6, 11, 13, 36, 43, 44, 45, 48, 49
Carney v. *Chapman*, 247 U.S. 102 20
Cherokee Intermarriage Cases, 203 U.S. 76 19
Colliflower v. *Garland*, 342 F.2d 369 ..... 24, 29
Crow Dog, Ex Parte, 109 U.S. 556 22
Diaz v. *United States*, 223 U.S. 442 ..... 44, 46, 51

Cases—Continued Page

Examining Board of Engineers v. *Flores de Otero*, 426 U.S. 572 31
Fisher v. *District Court*, 424 U.S. 382 20
Fox v. *Ohio*, 5 How. 410 13
Grafton v. *United States*, 206 U.S. 333 ..... 7, 16, 30
Green v. *United States*, 355 U.S. 184 48
Iron Crow v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 29
Jeffers v. *United States*, No. 75-1805, decided June 16, 1977 ..... 11, 43, 44, 45, 48, 51
Jones v. *Meehan*, 175 U.S. 1 20
Keeble v. *United States*, 412 U.S. 205 ..... 22, 23, 32, 33, 38, 48, 50, 51
Lone Wolf v. *Hitchcock*, 187 U.S. 553 19
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164 ..... 5, 19
Middendorf v. *Henry*, 425 U.S. 25 49
Moore v. *Illinois*, 14 How. 13 ..... 6, 13
Morris v. *Hitchcock*, 194 U.S. 384 20
Morton v. *Mancari*, 417 U.S. 535 25
Native American Church v. *Navajo Tribal Council*, 272 F.2d 131 26
North Carolina v. *Pearce*, 395 U.S. 711 12
Oliphant v. *Schlie*, 544 F.2d 1007, certiorari granted *sub nom. Oliphant* v. *The Suquamish Indian Tribe*, No. 76-5729, June 13, 1977 29
Oliver v. *Udall*, 306 F.2d 819, certiorari denied, 372 U.S. 908 26
O'Neal v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140 41
Ortiz-Barraza v. *United States*, 512 F.2d 1176 29
Puerto Rico v. *Shell Co.*, 302 U.S. 253 ..... 16, 31

Cases—Continued Page

Puyallup Tribe, Inc. v. *Department of Game of Washington*, No. 76-423, decided June 23, 1977 20
Reynolds v. *Sims*, 377 U.S. 533 16
Roff v. *Burney*, 168 U.S. 218 19
Santa Clara Pueblo v. *Martinez*, No. 76-682, certiorari granted, May 16, 1977 20
Settler v. *Lameer*, 507 F.2d 231 29
Stone v. *United States*, 506 F.2d 561, certiorari denied, 420 U.S. 978 36
Talton v. *Mayes*, 163 U.S. 376 .... 9, 21, 27, 28, 30, 34
Tom v. *Sutton*, 533 F.2d 1101 29
United States v. *Antelope*, 430 U.S. 641 .... 8, 18, 23, 33
United States v. *DeCoteau*, 516 F.2d 16 37
United States v. *DeMarrias*, 441 F.2d 1304 37
United States v. *Feola*, 420 U.S. 671 36
United States v. *Kagama*, 118 U.S. 375 19
United States v. *Keeble*, 459 F.2d 757, reversed, 412 U.S. 205 37
United States v. *Kills Plenty*, 466 F.2d 240 .... 29, 37
United States v. *Lanza*, 260 U.S. 377 .... 6, 7, 9, 13, 14, 16, 32, 36, 37
United States v. *Mazurie*, 419 U.S. 544 .... 8, 18, 20
United States v. *Quiver*, 241 U.S. 602 .... 20, 21, 23, 33
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 20
United States v. *Walking Crow*, C.A. 8, No. 77-1136, decided August 10, 1977, petition for a writ of certiorari pending, No. 77-5539 .... 29, 37

Cases—Continued Page

United States v. *Winans*, 198 U.S. 371 19
Waller v. *Florida*, 397 U.S. 387 .... 7, 16, 30, 31, 44
Williams v. *Lee*, 358 U.S. 217 .... 20, 21, 26
Williams v. *United States*, 327 U.S. 711 51
Winton v. *Amos*, 255 U.S. 373 19
Worcester v. *Georgia*, 6 Pet. 515 .... 8, 17, 21

Constitution, statutes, and regulations:

United States Constitution:

Article I, Section 8, Clause 3 18
Fifth Amendment 2, 5, 12, 27, 28
Double Jeopardy Clause .... *passim*
Eleventh Amendment 20
Fourteenth Amendment 14

Act of March 3, 1885, 23 Stat. 362, 385 22
23 Stat. 362, 385 49
Act of July 3, 1950, 64 Stat. 319 31
Act of January 2, 1975, Pub.L. 93-580, 88 Stat. 1910, 25 U.S.C. (Supp. V) 174 note 40
Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1301 *et seq.* 24, 28
25 U.S.C. 1302(7) 10, 25, 34, 37
Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585 .... 4, 22
Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987, 25 U.S.C. 476, *et seq.* 24, 25
Section 16, 25 U.S.C. 476 25

Constitution, statutes, and regulations—Continued	Page
Indian Trade and Intercourse Act of June 30, 1834, Section 25, 4 Stat. 729, 733	22
4 Stat. 729, 733	49
10 Stat. 269, 370	49
15 Stat. 667	21
18 U.S.C. 111	36
18 U.S.C. 113	33
18 U.S.C. 1152	22, 33, 49, 50
18 U.S.C. 1153	2, 4, 22, 33, 35, 49, 50
18 U.S.C. 2032	3, 35, 50
18 U.S.C. 3242	32
25 U.S.C. 478b	25
Arizona Rev. Stat. Ann. (1956):	
13-252	4
13-821	51
13-822	51
7 Navajo Tribal Code 101 (1972)	26
17 Navajo Tribal Code (1972):	
Section 321	3
Section 351	3
17 Navajo Tribal Code 1, historical notes (CJA-1-59)	50
25 C.F.R. 11.1(b)	23
25 C.F.R. 11.1(d)-11.1(e)	25
25 C.F.R. 11.1(e)	26
25 C.F.R. 11.3-11.4	25
25 C.F.R. 11.38-11.87 NH	26

Miscellaneous:

American Indian Policy Review Commission, *Final Report* (1977)	40, 41, 42

Miscellaneous—Continued	Page
1972 Annual Report of the Judicial Branch, Navajo Nation	26
1976 Annual Report of the Judicial Branch, Navajo Nation	26
Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harvard Journal on Legislation 557 (1972)	28
Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976)	23, 24, 25, 28, 34, 41
Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951 (1975)	22
Cohen, *Handbook of Federal Indian Law* (1942 ed.)	8, 17, 18, 20, 25
Davis, *Court Reform in the Navajo Nation*, 43 J. Am. Jud. Soc'y 53 (1959)	26
Department of Interior, *Federal Indian Law* (1958 ed.)	21, 24
Hearings on the Constitutional Rights of the American Indian, S. Res. 53, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (Part 1) (1961)	42
Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J.Pub. L. 311 (1969)	41
Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969)	28

Miscellaneous—Continued — Page

Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818 (1968) — 42
Note, *Twice in Jeopardy*, 75 Yale L.J. (1965) — 46
Powers of Indian Tribes, 55 I.D. 14 (1934) — 17
S. Rep. No. 721, 90th Cong., 1st Sess. (1967) — 38, 48
S. Rep. No. 841, 90th Cong., 1st Sess. (1967) — 28
Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev. 387 (1974) — 40

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 545 F.2d 1255.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on December 2, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 23, 1977 (Pet. App. C). On April 13, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 20, 1977. The petition was filed on that date and was granted on October 3, 1977 (A. 33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars federal prosecution of an Indian defendant for violation of the Major Crimes Act (18 U.S.C. 1153) because of his earlier conviction in Indian tribal court of a lesser included offense arising from the same acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 1153 provides in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

* * * *

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

Title 17, Section 321, of the Navajo Tribal Code (1972) provides:

> Any Indian who shall willfully contribute to the delinquency of any minor shall be deemed guilty of an offense and, upon conviction thereof, shall be sentenced to labor for a period not to exceed 6 months.

STATEMENT

On October 16, 1974, an incident involving a young Indian girl occurred on the Navajo Indian Reservation in Many Farms, Arizona. Respondent, a Navajo Indian, was found intoxicated and taken into custody by an Indian policeman at the scene of the incident (A. 14-18); his clothing was disarranged and there was a blood stain on his face (A. 18). Two days later, he pleaded guilty in the Navajo Tribal Court to charges of willfully contributing to the delinquency of a minor and disorderly conduct, in violation of Title 17, Sections 351 and 321, of the Navajo Tribal

Code (1972). *The Navajo Nation* v. *Anthony Wheeler*, Case Nos. CL-321-3245-74 and CL-351-3238-74 (A. 9-10). Respondent was sentenced on the charge of contributing to the delinquency of a minor to serve 60 days in jail or to pay a fine of $120, and on the disorderly conduct charge to serve 15 days in jail (concurrently with the sentence on the first charge) or to pay a fine of $30 (A. 9-10). (The record does not show how the sentence was carried out.)

On May 21, 1975, an indictment was returned in the United States District Court for the District of Arizona (A. 11) charging that respondent, on October 16, 1974, "did assault * * * with intent to rape" the Indian girl, in violation of the Major Crimes Act, 18 U.S.C. 1153, and Ariz. Rev. Stat. Ann. 13-252 (1956). This indictment was dismissed on a ground not relevant here.[1] A superseding indictment (A. 12) returned on November 19, 1975, charged that on October 16, 1974, respondent "did carnally know a female Indian * * *, not his wife, who had not then attained the age of sixteen years but was fifteen years of age," in violation of 18 U.S.C. 1153 and 2023.

---

[1] The district court ruled that a provision of 18 U.S.C. 1153 (since deleted from the statute (Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585)) providing that "any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court" was impermissibly vague. (The Solicitor General was not informed of this decision by the United States Attorney and so did not have an opportunity to consider whether the government should appeal it.)

Respondent moved to dismiss this indictment on the ground that his federal prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment because of his previous conviction in tribal court of a lesser included offense arising from the same transaction (A. 25). The district court granted the motion to dismiss (A. 32).

The court of appeals affirmed (Pet. App. A, pp. 1a-8a). The court framed the primary issue as "whether Indian tribal courts and federal district courts are 'arms of different sovereigns' for purposes of the Double Jeopardy Clause" (*id.* at 1a). The court noted that tribal courts "are not merely a political unit of the Federal Government, such as federal district courts, military tribunals, etc.," and that the Indians are " 'a separate people, with the power of regulating their internal and social relations' " (*id.* at 4a-5a, quoting *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 173). The court nevertheless concluded that the Indian tribes "do not have the sovereign status of a state" (Pet. App. A, p. 5a), and therefore that "Indian tribal courts and United States district courts are not arms of separate sovereigns" (*id.* at 6a). The court accordingly ruled that the "dual sovereignty" principle applied by this Court in the federal-state context (see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187) was not applicable to this case.

The court then applied the rule that the Double Jeopardy Clause bars prosecution of a defendant who has previously been convicted by the same sovereign of a lesser included offense based on the same acts

(Pet. App. A, p. 7a; see *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977). The court held that "an individual cannot be indicted in federal court for a crime having been tried in Indian tribal court for a lesser included offense" (Pet. App. A, p. 8a). With respect to the charges here, the court determined that the offense of willfully contributing to the delinquency of a minor (one of the tribal offenses) was a lesser included offense of carnal knowledge of a female under the age of 16 years (the federal charge) (*id.* at 7a-8a). Accordingly, the court affirmed the dismissal of the indictment.

SUMMARY OF ARGUMENT

A. Although the Double Jeopardy Clause generally bars a second prosecution for the same offense after a conviction or acquittal, there is a firmly established exception that applies to separate prosecutions by separate sovereigns. *United States* v. *Lanza*, 260 U.S. 377; *Moore* v. *Illinois*, 14 How. 13. "[A]n act denounced as a crime by both * * * sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States* v. *Lanza*, *supra*, 260 U.S. at 382.

The Court has consistently applied this "dual sovereignty" principle in the context of successive state and federal prosecutions. *Abbate* v. *United States*, 359 U.S. 187; *Bartkus* v. *Illinois*, 359 U.S. 121. In doing so, it has pointed out that "[u]ndesirable consequences would follow" if the principle were abandoned (359 U.S. at 195). If a prior state prosecution were deemed to bar a federal prosecution based on the same conduct, "federal law enforcement must necessarily be hindered," especially where "the defendants' acts impinge more seriously on a federal interest than on a state interest" (*ibid.*). One solution would be "to displace state power to prosecute crimes based on acts which might also violate federal law," but "no one would suggest that * * * [this] is desirable," for it "would bring about a marked change in the distribution of powers to administer criminal justice * * *" (*ibid.*).

At the same time, the Court has refused to extend the dual sovereignty principle to permit successive prosecutions in contexts where both courts derive their authority from the same sovereignty. This is true of municipal courts and state courts (*Waller* v. *Florida*, 397 U.S. 387, 393), and of federal courts and territorial courts (*Grafton* v. *United States*, 206 U.S. 333, 354-355).

The test for determining the applicability of the dual sovereignty principle is whether the two governments are in a meaningful sense "two sovereignties, deriving power from different sources," each of which is "exercising its own sovereignty" in "determining what shall be an offense against its peace and dignity" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382).

B. Under this test, the dual sovereignty principle applies to permit a federal prosecution for a "major crime" following a conviction in an Indian tribal court for a lesser included offense based on the same conduct.

1. It is a fundamental principle of American Indian law, repeatedly acknowledged by this Court and the Congress, that the Indian tribes are " 'distinct, independent, political communities' " which are "qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty." Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.), quoting *Worcester* v. *Georgia*, 6 Pet. 515, 559. In particular, the power the tribes have to try and punish criminal behavior by Indians in Indian country springs not from any Act of Congress or other authorization of the federal government, but from the tribes' original sovereignty. To be sure, the tribes are subject to the plenary authority of Congress, which has limited tribal court jurisdiction both substantively and procedurally. Congress has also extended federal criminal jurisdiction to certain crimes committed by Indians in Indian country, including the crime with which respondent Wheeler was charged in federal district court in this case. But the criminal jurisdiction retained by the tribal courts is part of the authority of the tribes as "a separate people" (*United States* v. *Antelope*, 430 U.S. 641, 646), as "unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557).

The court of appeals relied on Congress' "complete, plenary control over the criminal jurisdiction of tribal courts" (Pet. App. A, p. 5a) to conclude that the authority those courts exercise is federal authority. This approach, which confuses congressional power to limit tribal authority with the source of the authority the tribe retains, was rejected by this Court in *Talton* v. *Mayes*, 163 U.S. 376, 384.

Since tribal courts exercise "local powers not created by the Constitution" (*id.* at 382), those courts are not so identified with the federal government that a tribal prosecution becomes a prosecution by an arm of the federal sovereign. Therefore, the Double Jeopardy Clause, which forbids a second prosecution "after a first trial for the same offense *under the same authority*" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382 (emphasis added)), does not bar a prosecution in federal court after conviction in a tribal court of a lesser included offense arising from the same acts.

2. Failure to apply the dual sovereignty principle to successive prosecutions by tribal and federal courts would lead to "undesirable consequences" of the same kind that the principle, as applied in the federal-state context, was designed to avoid. Federal law enforcement would be hindered if the Double Jeopardy Clause bars a federal prosecution following a prosecution in Indian tribal court for a lesser included offense. In this case, for example, by pleading guilty to a minor offense in tribal court and incurring a relatively minor sentence (which could be discharged by payment of a $150 fine), respondent would avoid

prosecution in federal court for a major federal crime for which he could be imprisoned for up to 15 years.

Since tribal courts by virtue of the Indian Civil Rights Act (25 U.S.C. 1302(7)) may impose no sentence exceeding six months' imprisonment, it is reasonable to assume that other persons in respondent's position would seek to avoid punishment commensurate with the gravity of their offense by first standing trial or pleading guilty in tribal court. Under existing institutional arrangements, federal authorities would be powerless to prevent this from happening.

To remove the resulting obstruction to federal law enforcement, Congress would be forced to restructure the relationship between tribal and federal authorities. Its most likely response would be to impose further limitations on the powers of tribal courts, or even to eliminate the criminal jurisdiction of those courts. It could do this, however, only at substantial cost to the prevailing federal policy of fostering tribal self-government and, in particular, of encouraging tribes to rely on their own judicial systems as a keystone of that self-government.

C. But even if tribal courts are viewed as arms of the federal sovereign, the Double Jeopardy Clause does not bar prosecution for a Major Crimes Act felony in a federal district court after conviction of a lesser included offense under tribal law in tribal court. Although the "general rule" is that the same governmental authority cannot try a defendant for a greater offense after it has convicted him of a lesser

included offense (*Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977), that general rule "does have some exceptions" (*Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, slip op. 13). The circumstances of this case either bring it within one of the recognized exceptions or warrant recognition of a further exception.

The exceptions recognized by this Court reflect circumstances in which there were compelling reasons why the greater offense could not have been tried, or was not tried, simultaneously with the lesser offense. Such reasons exist in the unique circumstances presented by tribal and federal courts, which as a practical matter operate quite independently of each other (as is also true of tribal and federal prosecuting authorities). The sentencing authority of tribal courts is so limited that they cannot adequately punish defendants who have committed serious crimes. Yet they are empowered to try such defendants, and such power is a legitimate component of tribal self-government. Moreover, they may often bring such prosecutions, as the Navajo court did in this case, before the time when a United States Attorney would be able to secure a federal indictment or, perhaps, even learn of the occurrence of the offense.

In such circumstances it is not unreasonable for the United States Attorney, in the exercise of his separate prosecutorial authority, to institute a subsequent prosecution seeking a penalty commensurate with the defendant's crime. Indeed, such a prosecution would seem compelled by the Congressional policy reflected in the Major Crimes Act and recognized by this Court.

Moreover, in this unique context, the greater (federal) and lesser included (tribal) offenses should not be regarded as "the same offense" for double jeopardy purposes. In this case carnal knowledge (the federal offense) was not, and could not have been, charged against respondent in tribal court, while contributing to the deliquency of a minor (the tribal offense) was not and could not have been charged against respondent in federal district court. Since no single court had jurisdiction of all the alleged crimes, another exception to the double jeopardy bar is applicable.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT PROSECUTION OF AN INDIAN DEFENDANT IN A FEDERAL COURT BECAUSE OF HIS PRIOR CONVICTION IN AN INDIAN TRIBAL COURT OF A LESSER INCLUDED OFFENSE ARISING FROM THE SAME ACTS.

A. The Double Jeopardy Clause Does Not Bar Successive Prosecutions by Separate Sovereign Governments for the Same Offense.

1. The Double Jeopardy Clause of the Fifth Amendment "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717. The Clause also "forbids successive prosecution and cumulative punishment for a greater and lesser included offense" arising from the same acts. *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977, slip op. 8.

A well-established exception applies, however, in the case of separate prosecutions for the same offense by separate sovereigns. Recognized at least as early as the decision of this Court in *Fox* v. *Ohio*, 5 How. 410 (see *Abbate* v. *United States*, 359 U.S. 187, 190-194; *Bartkus* v. *Illinois*, 359 U.S. 121, 131-132), the "dual sovereignty" principle was explained in *Moore* v. *Illinois*, 14 How. 13, 19, as follows:

> [E]very citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. * * * That either or both may (if they see fit) punish such an offender, cannot be doubted.

In *United States* v. *Lanza*, 260 U.S. 377, the Court for the first time applied the dual sovereignty principle to sustain a federal prosecution (under the Volstead Act) arising out of the same facts as a prior state conviction. The Court said (260 U.S. at 382):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition * * *.

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

"It follows," the Court said (*ibid.*), "that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. * * * [T]he double jeopardy * * * forbidden [by the Fifth Amendment] is a second prosecution under the authority of the Federal Government after a first trial for the same offense under the same authority."

The dual sovereignty principle was reaffirmed in *Bartkus* v. *Illinois*, 359 U.S. 121, and *Abbate* v. *United States*, 359 U.S. 187. In *Bartkus*, which dealt with the validity under the Fourteenth Amendment of a state prosecution following a federal prosecution for the same offense, the Court cited an array of cases as "irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense," and refused to disregard the "long, unbroken, unquestioned course of impressive adjudication" by ruling that due process compelled such a bar (359 U.S. at 136). And in *Abbate*, in which the federal prosecution followed the state prosecution, the Court found "[n]o consideration or persuasive reason not presented to the Court in the prior cases * * * why we should depart from [*Lanza*'s] firmly established principle" (359 U.S. at 195).

Instead, the Court in *Abbate* found that persuasive policy reasons supported continued adherence to that principle (*ibid.*):

> [U]ndesirable consequences would follow if *Lanza* were overruled. * * * [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice * * *. * * * Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.

2. While in *Lanza*, *Bartkus*, and *Abbate* the Court held that the dual sovereignty principle permitted successive federal and state prosecutions, the Court subsequently held in *Waller* v. *Florida*, 397 U.S. 387, that it did not permit successive prosecutions in municipal courts and state courts of general jurisdiction, since the power of the former "springs from the same organic law" that created the latter (*id.* at 393).[2] See also *Grafton* v. *United States*, 206 U.S. 333, 354-355 (Phillipine territorial court "derive[s] its powers" from the federal government); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264 (Puerto Rican and federal courts "whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty"). The test of whether the dual sovereignty principle applies is whether the two governments that seek to prosecute for the same acts are in a meaningful sense "two sovereignties, deriving power from different sources," each of which is "exercising its own sovereignty" in "determining what shall be an offense against its peace and dignity" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382).

The inquiry in the present case, therefore, is whether the Indian tribes possess sufficient characteristics of sovereignty and independence to make the dual sovereignty principle applicable when a federal prosecution follows a tribal court conviction for an offense arising from the same acts. The court of appeals held that they do not, that in essence the tribal courts are arms of the federal government. As we propose to show, however, this conclusion misapprehends the nature of the Indian tribes and of their historically rooted relationship with the federal government. What is more, it threatens to interfere with federal law enforcement in a way that could only be remedied by a major redistribution of legal powers between the federal government and the Indian tribes, at the cost of basic values embedded in the existing Indian policy of Congress and the Executive Branch.

---

[2] Quoting from *Reynolds* v. *Sims*, 377 U.S. 533, 575, the Court in *Waller* observed (397 U.S. at 392):

> Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.

B. The Dual Sovereignty Principle Applies to Permit Successive Prosecutions by an Indian Tribe and the Federal Government.

1. *The Indian tribes possess attributes of sovereignty from which their authority is derived independently of the federal government.*

a. More than 35 years ago Felix Cohen stated that "[f]rom the earliest years of the Republic the Indian tribes have been recognized as 'distinct, independent, political communities,' and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty."[3] This fundamental principle of American

---

[3] *Handbook of Federal Indian Law* 122 (1942 ed.) (footnote omitted), quoting *Worcester* v. *Georgia*, 6 Pet. 515, 559. See also *Powers of Indian Tribes*, 55 I.D. 14, 19-20 (1934).

Indian law has repeatedly been acknowledged by this Court and by Congress.[4]

It finds support, first, in the Constitution, which treats Indian tribes *in pari materiae* with States and foreign nations. Article I, Section 8, clause 3. Although the tribes are no longer fully sovereign nations, this Court has emphasized that they possess a "unique status * * * as 'a separate people' with their own political institutions" (*United States* v. *Antelope*, 430 U.S. 641, 646), that they "are unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557), and that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our

---

[4] As Cohen wrote (*Handbook of Federal Indian Law, supra*, p. 123, footnotes omitted):

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

own Government" (*McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 172).[5]

To be sure, the Indian tribes are wards of the federal government and are subject to its plenary authority to regulate their affairs. *Winton* v. *Amos*, 255 U.S. 373, 391; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553. Indeed, Congress has imposed substantial limitations upon tribal authority and independence. But to acknowledge that the tribes are subject to such regulation by Congress is not to say that they have lost all vestiges of their original sovereignty. Save where Congress has spoken to the contrary, the tribes exercise governmental powers that derive from their original status as sovereign nations.

Like other peoples who have "the power of regulating their internal and social relations" (*United States* v. *Kagama*, 118 U.S. 375, 382), the tribes have exclusive authority, in the absence of congressional legislation to the contrary, to confer or withdraw tribal citizenship. *Roff* v. *Burney*, 168 U.S. 218, 222; *Cherokee Intermarriage Cases*, 203 U.S. 76; cf.

---

[5] In *United States* v. *Winans*, 198 U.S. 371, 381, in construing a treaty limitation on the fishing rights of the Yakima Indians, the Court said: "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment * * *. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Santa Clara Pueblo v. *Martinez*, No. 76-682, certiorari granted May 16, 1977. They have "been accorded the widest possible latitude in regulating the domestic relations of their members" (*Handbook of Federal Indian Law*, *supra*, at 137), including the power to grant marriages and divorces (*United States* v. *Quiver*, 241 U.S. 602; *Carney* v. *Chapman*, 247 U.S. 102); to provide for adoptions and guardianships (*Fisher* v. *District Court*, 424 U.S. 382); and to prescribe the manner of descent and distribution of property. *Jones* v. *Meehan*, 175 U.S. 1.

Unless Congress has provided otherwise, the tribes are immune from suit in state or federal court, protected in much the same way as the Eleventh Amendment protects the States and the principle of sovereign immunity protects the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512; *Puyallup Tribe, Inc.* v. *Department of Game of Washington*, No. 76-423, decided June 23, 1977. The tribes possess inherent authority to tax (*e.g.*, *Morris* v. *Hitchcock*, 194 U.S. 384; *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (C.A. 8)), and to regulate conduct on the reservation whether it involves Indians or non-Indians. *E.g.*, *United States* v. *Mazurie*, 419 U.S. 544 (upholding, with respect to non-Indians, a tribal ordinance requiring a license to sell liquor in Indian country).[6]

---

[6] *Williams* v. *Lee*, 358 U.S. 217, illustrates the broad self-governing powers of the Navajo Nation in particular. That case involved a civil suit brought in Arizona state court by a non-Indian to collect for goods sold to an Indian and his wife on the Navajo reservation. After the Arizona Supreme Court

b. Like tribal powers generally, tribal criminal jurisdiction in particular springs from a tribe's original sovereignty. See Department of the Interior, *Federal Indian Law* 444-449 (1958 ed.). This Court has recognized that, in the absence of an explicit withdrawal of jurisdiction by Congress, the power to try and punish criminal behavior by Indians in Indian country inheres in tribal courts, and that this power does not depend on any grant from Congress but is a residual attribute of tribal sovereignty, one that has often been expressly acknowledged by treaty. See *Worcester* v. *Georgia*, 6 Pet. 515, 560-561; *Talton* v. *Mayes*, 163 U.S. 376, 379-380; *United States* v. *Quiver*, *supra*, 241 U.S. at 605-606. In recognition of this retained power, not only the treaties between the tribes and the federal government, but also the original

---

upheld the jurisdiction of the lower court, this Court reversed and held that jurisdiction over the matter rested exclusively with the Navajo tribal court. From its previous cases beginning with *Worcester* v. *Georgia*, 6 Pet. 515, the Court concluded that "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (358 U.S. at 220). The Court said that the 1868 treaty between the United States and the Navajo Nation (15 Stat. 667) reflected "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of [the] tribal government * * *" (358 U.S. at 221-222). On the basis of these principles, as well as the finding that no Act of Congress gave state courts jurisdiction over the controversy in question, the Court concluded that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves" (*id.* at 223).

statutory enactments of Congress, consistently denied the federal courts even concurrent jurisdiction over crimes between Indians in Indian country, leaving exclusive authority to deal with such crimes to the tribes. See generally Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 953-972 (1975).

Thus, the first permanent Indian Trade and Intercourse Act (Act of June 30, 1834, Section 25, 4 Stat. 729, 733) applied to Indian country the laws governing crimes committed in places under the exclusive jurisdiction of the United States, but provided that "[t]he same shall not extend to crimes committed by one Indian against the person or property of another Indian." See 18 U.S.C. 1152. As a result of this limitation on federal authority, this Court in *Ex Parte Crow Dog*, 109 U.S. 556, held that federal courts had no jurisdiction over the murder of an Indian by another Indian on a reservation, since, as the Court later explained, "in the absence of explicit congressional direction, the Indian tribe retained exclusive jurisdiction to punish the offense." *Keeble* v. *United States*, 412 U.S. 205, 209-210.

In response to the *Crow Dog* decision, Congress passed the Major Crimes Act (Act of March 3, 1885, 23 Stat. 362, 385), which made it a federal crime for an Indian to commit any of seven major offenses on an Indian reservation.[7] See 18 U.S.C. 1153. But that Act was "a carefully limited intrusion of federal

---

[7] The Act presently includes 14 enumerated offenses. See Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585.

power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." *United States* v. *Antelope*, *supra*, 430 U.S. at 643 n. 1, quoting *Keeble* v. *United States*, *supra*, 412 U.S. at 209 (describing the government's characterization of the Act). After enactment of the Major Crimes Act, the Court in *United States* v. *Quiver*, *supra*, reaffirmed that punishment for offenses by one Indian against another, except the offenses enumerated in the Major Crimes Act, remained within the exclusive jurisdiction of the tribes. This principle, the Court said (241 U.S. at 605-606), was "in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[.]"

Indian tribal courts, as the instrumentalities of a tribe's criminal jurisdiction, derive their authority not from the federal government but from the powers of self-government inhering in the tribe.[8] See Clinton,

---

[8] Indian tribal courts are not to be confused with the Courts of Indian Offenses, so-called "C.F.R. courts," that were established in 1883 by regulations of the Commissioner of Indian Affairs and are still provided for in federal regulations as a vehicle of "law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down * * *" (25 C.F.R. 11.1(b)). See Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 553-554 (1976). The regulations also establish a Code of Indian Offenses enforceable by these courts, but provide that once a tribal law and order code has been adopted by the tribe and

Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 553-564 (1976). No federal statute creates tribal courts, authorizes their existence, or confers jurisdiction on them. Just as no Act of Congress is the source of tribal immunity or the tribal power to tax, so the powers of the tribal courts exist independently as an unextinguished residuum of the tribes' original sovereignty.

Of course, Congress has imposed both substantive and procedural limitations on the exercise of tribal court jurisdiction, as it has on other aspects of tribal authority. The most significant procedural constraints are established by the Indian Civil Rights Act of 1968 (Title II, 82 Stat. 77, 25 U.S.C. 1301, *et seq.*), which requires tribal proceedings to provide most of the protections of the Bill of Rights of the federal Constitution and which limits the punishment tribal courts may impose to that prescribed for petty offenses (see 25 U.S.C. 1302(7)). In addition, the Secretary of the Interior has promulgated regulations relating to the qualification and appointment of tribal judges and providing for the Secretary's approval of tribal criminal codes. See 25 C.F.R. 11.1(d)-11.1(e) and 11.3-11.4; Clinton, *supra*, 18 Ariz. L. Rev. at 554, 557.

But these federal limitations on the authority of tribal courts do not affect the source or character of the authority those courts retain, an authority that springs from the nature of the tribes as "quasi-sovereign * * * entities" (*Morton* v. *Mancari*, 417 U.S. 535, 554).[9] To the extent that Congress has not

---

approved by the Secretary of the Interior, the provisions in the regulations dealing with the Courts of Indian Offenses are, in the main, no longer applicable to that tribe. Because federal policy since 1934 has generally been to encourage the tribes to set up their own courts (see the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987, 25 U.S.C. 476, *et seq.*), Courts of Indian Offenses exist on increasingly few reservations. See Clinton, *supra*, 18 Ariz. L. Rev. at 554.

There is some question whether Courts of Indian Offenses derive their authority from tribal sovereignty (see *Colliflower* v. *Garland*, 342 F.2d 369 (C.A. 9)), since they were created and operate pursuant to federal regulations. Cf. *Federal Indian Law, supra*, at 451-452. But that question is immaterial here because the Navajo Tribal Court is a true tribal court (see p. 26, n. 10, *infra*), not a Court of Indian Offenses.

[9] The tribal governmental powers were not, as respondent appears to argue (Memo. in Opp. 7), transformed into federally created powers by passage of the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987. That Act is not an organic one; as Professor Cohen noted (*Handbook of Federal Indian Law, supra*, at pp. 129-130), it "had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes * * *." In particular, Section 16 of the Act, 25 U.S.C. 476, provides that a tribe residing on a reservation "shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws," subject to ultimate approval by the Secretary of the Interior. But as the language of this and succeeding sections makes clear, adoption of a tribal constitution under the Act is optional with the tribes and does not affect tribal recognition by the federal government. See, *e.g.*, 25 U.S.C. 478b. Indeed, although 25 U.S.C. 476 grants certain powers to tribes that adopt a constitution under the Act (*e.g.*, the right to employ legal counsel), it states that these powers are "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law * * *."

limited their power, the tribal courts exercise a criminal jurisdiction essentially like that exercised by any sovereign.[10]

c. The court of appeals based its conclusion that the Indian tribes cannot be considered separate sovereigns for the purpose of the Double Jeopardy Clause largely on Congress' "complete, plenary control over the criminal jurisdiction of tribal courts" (Pet. App. A, p. 5a). This approach confuses congressional power to limit (or abolish) tribal authority with the source of whatever authority the tribe retains.

This Court rejected such an approach in *Talton* v. *Mayes*, 163 U.S. 376. There, the federal government's plenary authority over Indian tribes was asserted as a basis for concluding that the Fifth Amendment applied to Indian tribal court proceedings. The question, thus, was "whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress" (*id.* at 382-383). The Court responded that "[t]he repeated adjudications of this court have long since answered the former question in the negative" (*id.* at 383). The Court recognized that all tribal rights of self-government "are subject to the supreme legislative authority of the United States," but held that "[t]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States" (*id.* at 384). "It follows that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment * * *" (*ibid.*).

---

[10] The institutions of the Navajo Tribe illustrate these principles. The governing law is the Navajo Tribal Code, an extensive legal code (comprising 23 titles and published in three volumes) enacted by the Tribe's elected legislature, the Navajo Tribal Council. Title 17 of the Code contains the law and order provisions, including those that respondent was convicted of violating. Many of these provisions were originally taken over from a law and order code promulgated by the Secretary of the Interior (see 25 C.F.R. 11.38-11.87NH), but once the Code was adopted by the Tribal Council and approved by the Secretary of the Interior (see 25 C.F.R. 11.1(e)), it became the Tribe's law; the Secretary by approving the tribal enactments "had simply recognized the valid governing authority of the Tribal Council," and his own code "was no longer to apply to the Navajo Tribe." *Oliver* v. *Udall*, 306 F.2d 819, 822-823 (C.A.D.C.), certiorari denied, 372 U.S. 908; cf. *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (C.A.D.C.).

Enforcement of the Navajo law and order code occurs in the tribal courts, which consist of the Trial Court of the Navajo Tribe and the Court of Appeals of the Navajo Tribe. See 7 Navajo Tribal Code 101. These courts were established by resolution of the Tribal Council in 1958 to take the place of the Courts of Indian Offenses which had been established on the reservation (see note 8, *supra; Williams* v. *Lee, supra*, 358 U.S. at 221-222). The new courts were "clearly and exclusively the judicial branch of the Navajo nation." Davis, *Court Reform in the Navajo Nation*, 43 J. Am. Jud. Soc'y 53, 54 (1959); see 1972 Annual Report of the Judicial Branch, Navajo Nation 8 ("The Courts of the Navajo Nation derive their authority and power from the Navajo Tribal Council * * *"). In recent years approximately 29,000 criminal cases annually are filed in these courts. 1976 Annual Report of the Judicial Branch, Navajo Nation 24.

The position of the court of appeals cannot be squared with *Talton*. If tribal courts exercise "local powers not created by the Constitution" and not subject to the Fifth Amendment, they are not so identified with the federal government that a tribal prosecution becomes a prosecution by an arm of the federal sovereign.[11] *Talton* establishes that, contrary to the court of appeals' approach, the relevant focus in defining the nature of tribal self-government is not on the power of the federal government to limit tribal authority, but on the source from which the tribal authority springs. That source, with the Navajos as with the Cherokees, "existed prior to the Constitution" and does not flow from the Constitution. The source of authority of the tribal courts is not the federal gov-

---

[11] Respondent argues (Memo. in Opp. 8-9) that reliance on *Talton* is no longer valid because the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, *et seq.*, now subjects tribal authority to most of the same restrictions found in the constitutional Bill of Rights. The Indian Civil Rights Act confirms rather than undermines the holding of *Talton*, since the need for the statutory limitations on tribal power imposed by the Act was largely based on the premise that tribal courts are not arms of the federal government and thus not subject to constitutional limitations. See S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967); Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harvard Journal on Legislation 557, 588 (1972); Clinton, *supra*, 18 Ariz. L. Rev. at 561-562; Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1345 (1969).

ernment, as the court of appeals held, but the original and inherent sovereignty of the Indian tribe.[12]

The court of appeals further stated that if "forced to choose a relevant analogy" by which to define the status of tribal courts for dual sovereignty purposes, it would select not state courts but territorial courts, which were described in *Grafton* v. *United States*, 206 U.S. 333, as "civil court[s] proceeding under the authority of the United States" (Pet. App. A, pp. 5a-6a). That choice was misguided.

---

[12] The court of appeals for the Eighth Circuit has recently held, in express disagreement with the court of appeals here, that " 'Tribal Courts are not arms of the same sovereign as the United States District Court,' " and thus that the Double Jeopardy Clause does not bar successive tribal and federal prosecutions for the same offense. *United States* v. *Walking Crow*, No. 77-1136, decided August 10, 1977, slip op. 4, petition for a writ of certiorari pending (No. 77-5539), citing and quoting *United States* v. *Kills Plenty*, 466 F.2d 240 (C.A. 8), and *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (C.A. 8).

The Ninth Circuit itself has recognized the sovereignty of Indian tribes and tribal courts on other occasions. In *Oliphant* v. *Schlie*, 544 F.2d 1007 (C.A. 9), certiorari granted *sub nom. Oliphant* v. *The Suquamish Indian Tribe*, No. 76-5729, June 13, 1977, the court of appeals, in holding that a tribal court could properly try and convict a non-Indian for certain tribal offenses, reasoned that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed" (544 F.2d at 1009). In the court's view, the question was "not whether Congress has conferred jurisdiction [over non-Indians] upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question * * * is, did Congress (or a treaty) take that jurisdiction away" (*id.* at 1009 n. 1). See also *Tom* v. *Sutton*, 533 F.2d 1101, 1103 (C.A. 9) ("Under their sovereign status, the Indian tribes are vested with the inherent power to create and administer a criminal justice system"). See also *Settler* v. *Lameer*, 507 F.2d 231 (C.A. 9); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176 (C.A. 9). But see *Colliflower* v. *Garland*, 342 F.2d 369 (C.A. 9) (dealing with a Court of Indian Offenses (see note 8, *supra*)).

The Philippine territorial court under consideration in *Grafton* was, as this Court stated, a "tribunal deriving its jurisdiction and authority from the United States" (206 U.S. at 352). "[T]he Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States" (*id.* at 354). As the Court has since stated in *Waller* v. *Florida*, 397 U.S. 387, the relationship of the Philippine territorial government to the federal government was analogous for dual sovereignty purposes to "the relationship between municipal and state governments," where the power of the municipal court "springs from the same organic law that created the state court of general jurisdiction" (*id.* at 393). See note 2, *supra*.

In both *Grafton* and *Waller*, the two governmental entities seeking to prosecute for the same acts derived their authority from the same source, the federal government in *Grafton* and the state government in *Waller*. In contrast, as *Talton* v. *Mayes* makes clear, the powers of Indian tribal courts do not spring from the federal government but from a preexisting and independent tribal sovereignty that

the federal government simply continues to recognize.[13]

d. Since tribal prosecutions are not prosecutions by an arm of the federal sovereign, the Double Jeopardy Clause—which forbids a second prosecution

---

[13] In *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, relied on by respondent (Memo. in Opp. 3-4), this Court in *dicta* (see *Waller* v. *Florida*, *supra*, 397 U.S. at 393 n. 5) stated that the insular courts of Puerto Rico and the federal district court for Puerto Rico "are creations emanating from the same sovereignty" and therefore that prosecution in one court would bar prosecution in the other court for the same offense (302 U.S. at 264). The Court's opinion describes at length (*id.* at 258-264) the source of Puerto Rico's authority as a "congressional grant of power" reflecting "the general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters" (*id.* at 263). Puerto Rico's status in 1937 when *Shell Co.* was decided was thus different from that of a State or an Indian tribe, neither of which derives its authority from federal statutes.

Respondent points out (Memo. in Opp. 3-4) that Puerto Rico now has a "degree of autonomy and independence normally associated with States of the Union" (*Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572, 594; see Pet. App. A, p. 5a n. 7), and argues that *Shell Co.* therefore stands for the proposition that the Court will not apply the dual sovereignty principle outside the precise federal-state context. The argument is misleading. The "quasi-statehood" of Puerto Rico arose only in 1952, when by the Act of July 3, 1950, 64 Stat. 319, "Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States" (*Examining Board*, *supra*, 426 U.S. at 597). Whether the *dicta* in *Shell Co.* would be followed today in the light of this "compact" (426 U.S. at 593) with the people of Puerto Rico is an open question. But the Indian tribes, unlike the government of Puerto Rico, have never been creations of federal sovereignty.

"after a first trial for the same offense *under the same authority*," *United States* v. *Lanza*, *supra*, 260 U.S. 382 (emphasis added)—does not bar prosecution in federal court after prosecution in a tribal court for a lesser included offense arising from the same acts. Indian tribes and the federal government, like states and the federal government, are "two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory" (*United States* v. *Lanza*, *supra*, 260 U.S. at 382). In the exercise of their respective powers as applied to the acts of respondent Wheeler, the Navajo Tribe and the federal government have each determined "what shall be an offense against its peace and dignity" (*ibid.*).

It might be argued that there is no independent tribal interest in dealing with conduct such as respondent's—that the former tribal interest in dealing with serious offenses involving Indians has been displaced by Congress' assertion of its guardianship role through enactment of the Major Crimes Act.[14]

---

[14] As pointed out in *Keeble* v. *United States*, *supra*, 412 U.S. at 210, the Act was passed in 1885 out of a belief by Congress that tribal remedies for serious offenses "were either nonexistent or incompatible with principles that Congress thought should be controlling." Section 3242 of Title 18, derived from the Act, therefore provides that an Indian tried under the Major Crimes Act "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the [major] crimes within the exclusive jurisdiction of the United States." *Keeble* held that, under Section 3242, an Indian tried for a major crime is entitled to a lesser-included-offense instruction (if warranted by the evidence) even though

But this is not so. The Major Crimes Act, as the government has previously noted (see *United States* v. *Antelope*, *supra*, 430 U.S. at 643 n. 1), is "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." It was not intended to extinguish the independent interest of the tribes in dealing with conduct affecting relations within the tribe, or to abrogate the long-established policy "that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise" (*United States* v. *Quiver*, *supra*, 241 U.S. at 605-606).[15]

Section 1153 does not expressly confer jurisdiction over the lesser offense. But *Keeble* expressly left undisturbed the balance of jurisdiction on the reservations which leaves to the tribes exclusive authority to initiate prosecutions for simple assault and similar lesser crimes by Indians; it held only that Congress had elected to permit Indian defendants to avail themselves of a right available to non-Indians in federal courts (see 18 U.S.C. 1152 and 113). As the Court said (412 U.S. at 214), its holding "neither expands the reach of the Major Crimes Act nor permits the Government to infringe the residual jurisdiction of a tribe by bringing prosecutions in federal court that are not authorized by statute. We hold only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense, assuming of course that the evidence warrants such an instruction. No interest of a tribe is jeopardized by this decision."

[15] This Court has not had occasion to decide whether the Major Crimes Act supersedes or only supplements tribal juris-

A significant tribal interest in punishing conduct such as respondent's thus persists despite the assertion of federal power to punish the same acts. Respondent's conduct here violated a tribal ordinance (against contributing to the delinquency of a minor) designed to enforce the tribe's interest in maintaining the internal peace and order of the Indian community and the personal safety and dignity of its members. Respondent therefore was properly subject to punishment by the tribal court. At the same time his conduct may have constituted, as the federal indictment alleged, a major federal crime (carnal knowledge of a female under the age of sixteen).[16] Each government, tribal and federal, should be entitled to give effect to its separate interest in keeping the peace and maintaining justice.

---

diction over major crimes. See *Talton* v. *Mayes, supra;* Clinton, *supra*, 18 Ariz. L. Rev. at 559-560. Of course, the Indian Civil Rights Act (25 U.S.C. 1302(7)) now limits the sentencing power of tribal courts so as to disable them from effectively punishing major crimes.

[16] Respondent's conduct may also have constituted, as alleged in the earlier federal indictment that was dismissed on grounds unrelated to respondent's culpability, see page 4, note 1, *supra*, the major federal crime of assault with intent to rape.

2. *Failure to apply the dual sovereignty principle to successive prosecutions by tribal and federal courts would lead to "undesirable consequences" of the same kind that the principle, as applied in the federal-state context, was designed to avoid.*

The court of appeals' holding in this case means that an Indian who is convicted in tribal court of a violation of tribal law that constitutes a lesser included offense of one of the crimes enumerated in the Major Crimes Act (18 U.S.C. 1153) may not subsequently be tried in federal court for the "major crime" arising from the same conduct. If this holding stands, respondent will have avoided prosecution for a crime for which he was liable to be imprisoned for up to 15 years (18 U.S.C. 2032), by pleading guilty to a minor offense in tribal court and incurring a relatively minor sentence.[17] Indeed, if the court of appeals is correct, then any Indian who commits a major crime such as murder, arson, or rape, which subjects him to federal prosecution and the possibility of significant punishment under 18 U.S.C. 1153, would secure immunity from such prosecution by standing trial in Indian tribal court—or pleading guilty, as respondent did—on a minor offense that is a lesser included offense of the major crime.[18] See *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977, slip op. 7-8. Such a result is not only unwarranted by precedent, as we have argued, but its foreseeable consequences provide additional reason for this Court to reject the conclusion of the court of appeals.

---

[17] Although the offense with which respondent is here charged—carnal knowledge of a minor female—does not necessarily entail use of force, there was against respondent at least a *prima facie* case of forcible sexual assault, as evidenced by the original indictment for assault with intent to rape that was dismissed on grounds unrelated to respondent's culpability (see page 4 and note 1, *supra*). If respondent indeed committed a forcible sexual assault, the sentence imposed by the tribal court, which respondent could satisfy by paying a fine of $150, might well be considered less than adequate punishment.

These would be much like the "undesirable consequences" to which this Court pointed in *Abbate* v. *United States*, *supra*, when it refused to overrule the holding in *United States* v. *Lanza*, *supra*, that a previous conviction by a State does not operate as a constitutional bar to federal prosecution for the same acts. As the Court said (359 U.S. at 195; see page 15, *supra*), "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered," especially where the sentence for the federal offense is markedly greater than that for the state offense. But, the Court continued, "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on

---

[18] Moreover, the holding of the court of appeals is not limited to federal prosecutions under the Major Crimes Act (see Pet. App. A, p. 8a). It would also apply, for example, to cases where an Indian was charged with assaulting a federal officer (18 U.S.C. 111) after having been tried in tribal court for assault involving the same acts. See *United States* v. *Feola*, 420 U.S. 671; *Stone* v. *United States*, 506 F.2d 561 (C.A. 8), certiorari denied, 420 U.S. 978.

acts which might also violate federal law," a step that "would bring about a marked change in the distribution of powers to administer criminal justice * * *" (*ibid.*). Thus, the Court concluded, "unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions" (*ibid.*).

Similarly here, federal law enforcement must necessarily be hindered if the Double Jeopardy Clause bars a federal prosecution following prosecution in Indian tribal court for a lesser included offense. Since by virtue of the Indian Civil Rights Act (25 U.S.C. 1302(7)) the tribal courts may impose no sentences exceeding six months' imprisonment, it seems reasonable to assume that many persons who have committed serious crimes on the reservations would seek to avoid punishment commensurate with the gravity of their offense by first standing trial (or pleading guilty) in tribal court. See *United States* v. *Walking Crow*, *supra*, slip op. 6.[19] Under

---

[19] There are numerous reported instances in which an Indian defendant in federal court has been previously tried in a tribal court for a minor offense arising out of the same acts. See, *e.g.*, *United States* v. *Keeble*, 459 F.2d 757 (C.A. 8), reversed, 412 U.S. 205; *United States* v. *Kills Plenty*, 466 F.2d 240 (C.A. 8); *United States* v. *DeCoteau*, 516 F.2d 16 (C.A. 8); *United States* v. *DeMarrias*, 441 F.2d 1304 (C.A. 8).

If the tribal conviction for a lesser included offense bars a subsequent federal prosecution for a "major crime," the result the existing relationship between the Indian tribes and the federal government, federal authorities would be virtually powerless to prevent this result. Federal prosecutors have no control over the institution and disposition of proceedings in tribal court. Such proceedings often are held so swiftly that federal prosecutors may not be aware of the commission of the offense before the tribal proceeding has been completed, much less be able to present the matter to a grand jury and convene a trial. Here, for instance, the incident that gave rise to the charges against respondent occurred on October 16, 1974, and respondent pleaded guilty to the tribal offense on October 18, 1974 (see Pet. App. A, p. 2a).[20]

---

will contravene the congressional policy behind the Major Crimes Act as expressed in a Senate Report on the 1968 amendment to the Act (quoted by this Court in *Keeble* v. *United States*, *supra*, 412 U.S. at 211 n. 10):

> "Without this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 months. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court, where the punishment will be in proportion to the gravity of the offense." [Quoting S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967).]

[20] It might be suggested that tribal prosecutors and courts would forego voluntarily the prosecution of major offenses, in deference to the superior punishing power of federal courts, but that is not an adequate answer to the problem. Tribal authorities may well be unwilling to eschew prosecution of a violation of tribal law and rely on the federal government to prosecute and punish the offender. Such an abdication of authority might be considered inconsistent with tribal independence and the right of the tribe to define and prosecute offenses against its own peace and dignity. Many tribes tra-

Affirmance of the decision below could thus be expected, at least in the short run, to frustrate federal law enforcement with respect to major crimes committed by Indians in Indian country. It is reasonable to predict, however, that Congress would act to remedy the problem by restructuring the relationship between the tribal and federal courts—by putting into effect "a marked change in the distribution of powers to administer criminal justice" (*Abbate* v. *United States*, *supra*, 359 U.S. at 195). But the need for such legislation would confront Congress with a dilemma, forcing it to choose between values that have guided federal Indian policy in recent decades.

On the one hand, Congress might dramatically expand the scope of tribal criminal jurisdiction over serious crimes on the reservations, and correspondingly increase the sentences that tribal courts could impose. Yet such a choice, besides requiring careful evaluation of the present capabilities of the multifarious tribal courts and law enforcement mecha-

---

ditionally have had distinctive concepts of justice and of the role of judges and punishment in criminal cases (see note 25, *infra*), and these unique tribal interests would be compromised by foregoing or deferring tribal prosecution in favor of federal prosecution. Moreover, selective deferral of prosecution might pose significant practical problems for the tribe. Tribal prosecutors and courts would have to screen cases to determine whether the conduct involved was prosecutable under federal law, and perhaps to determine which the United States Attorney was in fact willing to prosecute. The result, even if feasible, could be a substantial surrender of the tribe's own criminal justice authority.

nisms, necessarily would reverse basic policy judgments made in the Major Crimes Act and in the Indian Civil Rights Act of 1968.

On the other hand, and perhaps more likely, Congress might respond to the evidence that "tribal criminal trials [have] become protective mechanisms for potential Major Crimes Act defendants"[21] by imposing further limitations on the powers of the tribal courts. These limitations could range from outright elimination of tribal criminal jurisdiction to some form of day-to-day federal control over the prosecutorial decisions of tribal authorities. Yet such inroads on the self-governing powers of the tribes would undermine the prevailing policy of the federal government to foster tribal self-government and, in particular, an increased role for the tribal judicial systems. As the American Indian Policy Review Commission has stated in its *Final Report* (p. 5-29):[22]

> The implications of [the *Wheeler*] decision for jurisdiction of Indian tribes and for the power of Congress to take corrective action through

---

[21] Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev. 387, 406 (1974).

[22] The Commission was established by the Act of January 2, 1975, Pub. L. 93-580, 88 Stat. 1910, "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians" (25 U.S.C. (Supp. V) 174 note). The Commission's *Final Report* was submitted to the Congress on May 17, 1977.

> legislation are apparent. If the doctrine of double jeopardy is applicable to judgments of tribal courts, there seems little doubt that either the Courts or Congress will soon strip the tribes of authority to act in any situation which might potentially be prosecuted in Federal court. It is simply not tolerable that a person can plead guilty in tribal court to a minor offense and thereby preclude prosecution in Federal court for a major offense. It is essential that the separate sovereignty of the tribes continue to be recognized if the jurisdictional balance between tribal and Federal courts is to be maintained.

There are approximately 71 tribal courts[23] currently operating, handling tens of thousands of cases per year.[24] These courts are generally viewed as central to the preservation of Indian culture and political identity (see, *e.g.*, *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-1145 (C.A. 8)). As one commentator has said (Clinton, *supra*, 18 Ariz. L. Rev. 557), "the tribal courts are often the single most important vestige of tribal sovereignty on the reservations."

---

[23] This figure is obtained from statistics compiled by the Department of the Interior as of March 18, 1977; see also Clinton, *supra*, 18 Ariz. L. Rev. at 554 and n. 263. In addition to the "tribal courts" such as the Navajo courts involved here (see note 10, *supra*), there are 16 "traditional" or semi-religious courts which also derive from the tribes' own self-governing powers but typically operate without written ordinances, and 32 Courts of Indian Offenses (described above, n. 8). See also Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311, 321-322 (1969).

[24] All told, the Indian courts handle an estimated 80,000 cases per year. American Indian Policy Review Commission, *Final Report*, p. 5-36.

The American Indian Policy Review Commission has stressed the importance of the tribal courts to the future of tribal self-government.[25] The Commission finds in its *Report* (p. 5-42; see note 22, *supra*) that tribal courts, though varying greatly in individual performance, on the whole "are evolving institutions that are capable of fair and efficient justice." The *Report* recommends that Congress take steps to promote their "maintenance and development," a process that "will require tribal experimentation and time." The decision of the court of appeals, however, threatens any efforts to enhance the capability and authority of the tribal courts.

The rule of the decision below would thus produce, if not an unacceptable hindrance of federal law enforcement authority, an imperative that Congress restructure the balance of criminal-justice powers between the federal government and the tribes in a way that sacrifies some important value of present federal policy. These "undesirable consequences" provide strong ground, as they did in *Abbate*, for applying the dual sovereignty principle to conclude that the Double Jeopardy Clause is no bar to the federal prosecution in this case.

---

[25] Several justifications have been advanced for maintaining an independent system of tribal courts. Effective application of Indian law, which in comparison to federal and state systems shows a stronger inclination to "restitutive" rather than "retributive" justice, may well call for a specialized judge capable of performing the arbitral duties of the tribal elder. Many Indians also feel that they will receive more equitable treatment in Indian courts than in others. Furthermore, many Indians see tribal justice as reflecting a unique concern for the individual defendant, as evidenced, for example, by the relaxed procedures for granting pre-trial release on personal recognizance. Note, ***The Indian: The Forgotten American***, 81 Harv. L. Rev. 1818, 1834-1837 (1968). See Hearings on the Constitutional Rights of the American Indian, S. Res. 53, before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (Part 1) 15-16 (1961).

C. Even If Tribal Courts Are Viewed As Arms of the Federal Sovereign, the Double Jeopardy Clause Does Not Bar Prosecution for a Major Crimes Act Felony in a Federal District Court After Conviction of a Lesser Included Offense Under Tribal Law in a Tribal Court.

The decision of the court of appeals rests on the assumption that, unless the dual sovereignty principle applies, the Double Jeopardy Clause inevitably bars prosecution of a defendant who has been convicted [redacted] of a lesser included offense based on the same acts. The decision last Term in *Brown* v. *Ohio*, *supra*, "establishes the general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense" (*Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, plurality opinion, slip op. 12). But that "general rule" is not absolute; it "does have some exceptions" (*id.* at 13). We submit that, even if the tribal and federal courts are viewed as arms of the same sovereign and hence as subject to the general rule of *Brown* v. *Ohio*,[28] a federal prosecution following a tribal prosecution in the circumstances of this case constitutes an exception to that rule and is not barred by the Double Jeopardy Clause.

1. The plurality opinion in *Jeffers* noted three exceptions to the bar against successive prosecutions. One arises "when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun" (slip op. 13), as in *Diaz* v. *United States*, 223 U.S. 442. A second may exist "when the facts necessary to the greater were not discovered despite the exercise of due diligence before the first trial" (*id.* at 14; accord, *Brown* v. *Ohio*, *supra*, slip op. 8 n. 7). "[A]nother exception" was recognized in *Jeffers* itself, covering cases where "the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other" (slip op. 14). And Mr. Justice Brennan in his concurring opinion in *Ashe* v. *Swenson*, 397 U.S. 436, stated that "[a]nother exception would be necessary if no single court had jurisdiction of all the alleged crimes" (*id.* at 453 n. 7).

The Court has thus recognized that, despite the general rule of *Brown* v. *Ohio*, prosecution for a greater offense after conviction of a lesser included offense remains permissible in exceptional circumstances. Such circumstances exist, as the listed exceptions indicate, when there is a compelling reason why the greater offense could not have been tried, or was not tried, simultaneously with the lesser offense. Given such circumstances, there are measures that can be invoked, as the Court explained in *Diaz*, to permit the second trial but nonetheless assure that the subsequent prosecution for the greater offense does not put the defendant "twice * * * in jeopardy" for the lesser offense on which he has previously been convicted.[37]

---

[28] We would also suggest that the Double Jeopardy Clause may not be such a wooden instrument that it must either be wielded with full force as in *Brown*, or set aside entirely under the dual sovereignty principle. There may be a middle range of dual-authority cases where the Clause applies in its essentials, but where its impact on prosecution for a greater offense after conviction for a lesser included offense is not subject to the analysis of *Brown*. In *Brown*, the successive prosecutions by the municipality and the county were "the acts of a single sovereign under the Double Jeopardy Clause" (slip op. 3 n. 4) not only in the sense that both prosecuting authorities derived their power from the State of Ohio, see *Waller* v. *Florida*, 397 U.S. 387, but also in the sense that both prosecutions were laid under the same statute, the Ohio Revised Code (see *Brown*, slip op. 1-2). In such a case it is true that

> * * * the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. [*id.* at 4.]

Such freedom for the exercise of legislative prerogatives is not preserved, however, where the Double Jeopardy Clause is applied to bar a prosecution under the laws of one legislature because of a previous prosecution under the laws of another legislature. In such cases, the gravity of the interference with the legislative function varies with the separateness and independence of the two legislatures and the polities they represent. Even short of the point where the dual sovereignty principle comes into play, the two legislative bodies may be sufficiently separate and independent, and the two statutes which the defendant is accused of violating sufficiently different in the interests they seek to vindicate, that the approach adopted in *Brown* v. *Ohio* for cases of successive prosecutions by "a State or the Federal Government" may not apply. Thus, all the considerations that render Indian tribes, their courts, and their criminal laws different from the federal government, its courts, and its criminal laws might be taken into account in this case to conclude that, even if the dual sovereignty principle were held not to apply, the circumstances nonetheless call for a more flexible application of the Double Jeopardy Clause than the one adopted in *Brown* v. *Ohio*.

2. The circumstances of this case either bring it within one of the recognized exceptions to the rule barring successive prosecutions or warrant recognition of a further exception. As we have already discussed (pp. 37-38, *supra*), Indian tribes and tribal courts exercise criminal jurisdiction quite

independently of federal prosecutors and the federal district courts. Even if this Court were to conclude that, as a conceptual matter, tribal courts derive their power from the federal sovereign, it is nevertheless the fact that, under existing arrangements, tribal courts operate wholly apart from federal district courts and tribal prosecutors are in no respect under the supervision or control of United States Attorneys. There are, as we have stressed, legitimate and compelling reasons for this arrangement: independent tribal courts are vital components of tribal self-government, and their contribution to the preservation of Indian culture and identity is essential to major policy objectives of the federal government.

There are also legitimate and compelling reasons why, given the unique status of Indian tribes and their courts, the need may arise for successive prosecutions by the tribe and the federal government arising from the same acts. The sentencing authority of tribal courts is so limited by the Indian Civil Rights Act that they cannot adequately punish defendants who have committed serious crimes. Yet the tribal courts are empowered to try such defendants. And they may often be expected to do so, as the Navajo court did in this case, before a United States Attorney would be able to secure an indictment instituting a prosecution in the federal district court (or even learn of the occurrence of the offense).

Such circumstances would seem to bring this case within the exception to the bar on successive prosecutions, suggested both by the plurality in *Jeffers* (slip op. 14) and the Court in *Brown* v. *Ohio* (slip op. 8 n. 7), applicable where the prosecution "is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge * * * have not been discovered despite the exercise of due diligence" (*ibid.*). In such circumstances, even after conviction and punishment by the tribal court, it is reasonable for the United States Attorney to seek a penalty commensurate with the defendant's crime as provided for by federal law.

---

[37] In *Diaz* the Court approved a prosecution for murder where, after the defendant had been convicted of assault and battery, the victim died and the homicide charge was brought. The Court explained (223 U.S. at 449) that the defendant had not been in jeopardy for the homicide at the trial for assault and battery and that "[a]ll that could be claimed for [the jeopardy of that trial] was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done * * *." Double punishment for the same offense, which the Double Jeopardy Clause also prohibits, can be avoided in such circumstances by taking into account, when fixing the sentence on the greater offense, any sentence already imposed for the lesser offense. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 289 n. 128 (1965).

This federal prosecution would not be an attempt to harass the defendant, nor an instance of the "repeated attempts to convict an individual for an alleged offense" that the Double Jeopardy Clause was intended to prohibit (*Green* v. *United States*, 355 U.S. 184, 187). On the contrary, where the defendant has committed a serious felony that has not been adequately punished in tribal court, the subsequent federal prosecution by the United States Attorney would be not only a legitimate exercise of his separate prosecutorial authority, but also a measure compelled by the congressional policy reflected in the Major Crimes Act.[28] In the unique circumstances presented by the independence and the sharply lim-

---

[28] See *Keeble* v. *United States*, *supra*, 412 U.S. at 210-211 and n. 10, where the Court noted the "congressional purpose * * * evident in the most recent amendment to the [Major Crimes] Act" as reflected in a passage from a Senate Report (S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967)), quoted in note 19, *supra*.

ited sentencing power of Indian tribal courts,[29] then, an exception to the rule of *Brown* v. *Ohio* should be recognized to allow a subsequent federal prosecution such as was attempted in this case.[30]

3. Moreover, the subsequent federal prosecution in the circumstances of this case falls within the exception that Mr. Justice Brennan in *Ashe* v. *Swenson*, *supra*, 397 U.S. at 453 n. 7, said "would be necessary if no single court had jurisdiction of all the alleged crimes." Respondent was not put in jeopardy of conviction of carnal knowledge during the proceedings against him in tribal court. Carnal knowledge was not charged in the criminal complaints filed against him in the name of the Navajo Tribe (A. 7-8), nor could it have been; tribal courts have no jurisdiction to try charges of the federal offense

---

[29] Cf. *Middendorf* v. *Henry*, 425 U.S. 25.

[30] In 18 U.S.C. 1152, which derives from statutes passed in 1834 and 1854 (4 Stat. 729, 733; 10 Stat. 269, 270; see p. 22, *supra*), Congress has provided that, in general, "the general [criminal] laws of the United States * * * shall extend to the Indian country." The statute provides an exception, however, for cases in which "any Indian committing any offense in the Indian country * * * has been punished by the local law of the tribe * * *." In contrast, the Major Crimes Act (18 U.S.C. 1153), which was enacted in 1885 (23 Stat. 362, 385) and extends federal jurisdiction to certain enumerated crimes committed by Indians in Indian country, contains no such exception. The Major Crimes Act thus reflects a congressional judgment that the enumerated offenses should be subject to trial in federal court whether or not the defendant has previously been convicted in tribal court—a judgment reconfirmed as recently as the 1968 amendment to the Act, see notes 19 and 28, *supra*.

of carnal knowledge under 18 U.S.C. 2032, and the Navajo Tribal Code contains no such offense.[31] Respondent's trial in federal district court would therefore be his first jeopardy of conviction of carnal knowledge.

At the same time, respondent at his federal trial would not again be in jeopardy for the offense of contributing to the delinquency of a minor. This offense was not charged in the indictment filed in federal district court, nor could it have been; federal courts have no jurisdiction to try tribal offenses, and where as here the alleged crime is committed by an Indian against another Indian, federal district courts have no jurisdiction over any indictment unless the offense is one of those enumerated in the Major Crimes Act (18 U.S.C. 1153; see 18 U.S.C. 1152). Contributing to the delinquency of a minor is not one of the enumerated offenses. Respondent therefore would not be placed in a second jeopardy for that offense in a federal trial on the carnal knowledge charge,[32] though he would, of course, be

---

[31] Although it is open to dispute whether Indian tribes can prosecute major crimes (see note 15, *supra*), the Navajo Tribe has chosen not to do so. In the Tribal Council Resolution adopting its law and order code (CJA-1-59), the Tribe states that "[i]t is not the intent of this resolution to usurp or interfere with enforcement of the * * * Major Crimes Law * * *" (see historical notes at 17 Navajo Tribal Code 1).

[32] The conclusion that this case falls within the exception where "no single court had jurisdiction of all the alleged crimes" is not inconsistent with *Keeble* v. *United States*, *supra*.

protected against cumulative punishment for the two offenses arising from the same acts.[33]

In sum, the unique circumstances presented by the dual jurisdiction of federal district courts and Indian tribal courts require, consistently with the recognized exceptions to the bar on successive prosecutions for

---

The Court there held (412 U.S. at 214) that if "the evidence warrants such an instruction," a defendant prosecuted under the Major Crimes Act may avail himself of "the protection afforded by an instruction on a lesser included offense" despite the district court's lack of independent jurisdiction over that offense. For several reasons, *Keeble* does not establish, for purposes of the exception to the bar on successive prosecutions, that the trial in the federal court would place respondent again in jeopardy for the lesser included tribal offense. First, the lesser-included-offense charge presumably would be derived from state or federal rather than tribal law. (Here, Arizona has a statute proscribing acts contributing to the delinquency of a minor (Ariz. Rev. Stat. Ann. 13-821, 13-822), although the elements are slightly different from those of the tribal offense. See also *Williams* v. *United States*, 327 U.S. 711.) Second, the facts as proved at the federal trial may not warrant the instruction, which need not be given unless "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" (412 U.S. at 208). Third, it would seem in any event that, consistently with *Diaz* v. *United States*, *supra*, 223 U.S. at 449, the Double Jeopardy Clause would protect the defendant from conviction or punishment on a verdict of guilty returned by the jury in federal court on the lesser included offense, since he had previously been subjected to jeopardy for that offense. Finally, the defendant's act of requesting the instruction on the lesser included offense in the federal court trial might properly be regarded as a waiver of any right he would otherwise have not to be subjected to a second trial on that particular offense. Cf. *Jeffers* v. *United States*, *supra*, slip op. 14.

[33] See note 27, *supra*.

greater and lesser included offenses, that respondent's conviction in tribal court of the tribal offense of contributing to the delinquency of a minor not bar his subsequent prosecution in federal district court for the federal crime of carnal knowledge.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

STEPHEN R. BARNETT,
Deputy Solicitor General.

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General.

JEROME M. FEIT,
MICHAEL W. FARRELL,
Attorneys.

DECEMBER 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 251350 104

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 28 1977
[illegible] JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA,
Petitioner,

-vs-

ANTHONY ROBERT WHEELER,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

THOMAS W. O'TOOLE
Federal Public Defender
District of Arizona
230 North First Avenue
Room 6425
Phoenix, Arizona 85025
(602) 261-3561
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 383-0835

SUBJECT INDEX

Page

TABLE OF AUTHORITIES ii

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT:

I. SUCCESSIVE PROSECUTIONS IN THE INDIAN TRIBAL COURT AND THE UNITED STATES DISTRICT COURT ARE BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BECAUSE THESE COURTS ARE ARMS OF THE SAME SOVEREIGN 9

A. The history of the dual sovereignty exception to the Double Jeopardy Clause shows that it has been applied only in the state-federal context and has been given only narrow application 9

1. Constitutional development of the dual sovereignty exception 9

2. The dual sovereignty doctrine has been applied only in the state-federal setting and has been given narrow application 11

3. This court has long recognized that Indian tribes are not states and are not truly sovereign 15

4. The evolution of Congressional plenary control over Indian tribes has long been evident and manifests the political reality of national expansion and the changing moods of society towards tribal self-government 18

Page

5. The pervasive exercise of plenary authority over Indian tribes establishes that tribes are in essence closely supervised arms of the federal sovereign 25

6. Recent decisions involving disputes with Indian tribes have recognized that Indian tribes are not inherently sovereign like states 30

7. The fact that Indian tribes are not sovereign like states, the lack of significant "undesirable consequences" and the availability of acceptable non-judicial remedies for any lack of federal control over tribal courts requires affirmance of Wheeler 36

B. Under the facts of this case, no other exception to the double jeopardy clause applies 42

CONCLUSION 47

TABLE OF AUTHORITIES

Cases:

Abbate v. United States, 359 U.S. 187 (1950)..................

Acunia v. United States, 404 F.2d 140 (9th Cir., 1968) 40

Ashe v. Swenson, 397 U.S. 436.................... 8,40,44,45

Bartkus v. Illinois, 359 U.S. 121 (1950) .... *passim*

Brown v. Ohio, ___ U.S. ___ . #75-6933 (1977) ... 8,40,44,46

Page

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 5,16,18,21,22

Cherokee Nation v. The Southern Kansas Railway Co., 135 U.S. 641 (1890) 5,12,22

Choctaw Nation v. United States, 119 U.S. 1 (1886).. 22

Colliflower v. Garland, 342 F.2d 269 (9th Cir., 1965) 6,25,38

Culbertson v. Wainwright, 453 F.2d 1219 (5th Cir., 1972) 45

Draper v. United States, 164 U.S. 240 (1896)............... 21

Edwards v. Commonwealth, 233 Ky. 356, 25 S.W. 2d 746 37

Ex Parte Crow Dog, 109 U.S. 556 (1883)............. 25,26,32

Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 13,37

Farragut v. City of Tampa, 22 S.2d 645 . (Fla., 1945) 45

Fox v. Ohio, 46 U.S. (5 How.) 410 (1847) 9,10

Grafton v. United States, 206 U.S. 333 (1907)........... *passim*

Green v. United States, 355 U.S. 184 45

Head Money Cases, 112 U.S. 580 (1884).................. 17

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir., 1956).. 25,26

Jeffers v. United States, ___ U.S. ___ , #75-1085 (1977).. 8,42,44,46

Jerome v. United States, 18 U.S. 101......................... 11

Johnson v. McIntosh, 21 U.S. 542 (1823).................. 15

Keeble v. United States, 412 U.S. 205 (1973)......... 7,32,33,45

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 5,12,15,17,24

Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855) 15

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) .... *passim*

Mescalaro Apache Tribe v. Jones, 411 U.S. 145 (1973).. 30,33

Page

Middendorf v. Henry, 425 U.S. 225 (1976) 43

Moore v. Illinois, 55 U.S. (14 How.) 13 (1852) 3,4,9,10

New York ex rel. Ray v. Martin, 326 U.S. 496 (1946) 21

Oliphant v. Schlie, 544 F.2d 1007 (9th Cir., 1976), cert. granted sub. nom. Oliphant v. The Suquamish Tribe, ___ U.S. ___ (#75-5729) 34,35

Oliver v. Udall, 306 F.2d 819 (D.C. Cir., 1962) 29

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 15

Petite v. United States, 361 U.S. 529 (1960) 14

Pettyjohn v. Evatt, 369 F. Supp. 865 (E.D. Tenn., 1974) 45

Puerto Rico v. The Shell Co., 302 U.S. 253 (1937) ...... *passim*

Puyallup Tribe v. Washington Game Department, ___ U.S. ___ (No. 76-423, 1977) 18

Rinaldi v. United States, ___ U.S. ___, No. 76-6194 (11-7-77), 22 Cr.L. 4061 5,14,46

Screws v. United States, 325 U.S. 91 11

Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 17

Talton v. Mayes, 163 U.S. 376 (1896) 5,6,21,22,28,32

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 15

The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870) 17

The Kansas Indians, 5 Wall. 737 (1867) 30

Thompson v. Oklahoma, ___ U.S. ___ (1977) 45

United States v. Antelope, 430 U.S. 641 (1977) .... *passim*

United States v. Cleveland, 503 F.2d 1067 (9th Cir., 1974) 40

United States v. DeCoteau, 516 F.2d 16 (8th Cir.) 38

United States v. DeMarrias, 441 F.2d 1304 (8th Cir.) 38

Page

United States v. United States Fidelity Co., 309 U.S. 506 (1940) 13,18

United States v. Heath, 509 F.2d 16 (9th Cir., 1974) 2,34

United States v. Kagama, 118 U.S. 375 (1886) .... *passim*

United States v. Keeble, 459 F.2d 757 (8th Cir.), reversed 412 U.S. 205 38

United States v. Kills Plenty, 466 F.2d 240 (8th Cir., 1972) 25,38

United States v. LaPlant, 156 F. Supp. 660 (D.C. Mont., 1957) 38

United States v. Lanza, 260 377 (1922) .... *passim*

United States v. Marigold, 50 U.S. (9 How.) 560 (1850) 9,10

United States v. Mason, 213 U.S. 115 37

United States v. Mazurie, 419 U.S. 544 (1975) 7,33,34,35

United States v. McBratney, 104 U.S. 621 (1882) 21,34

United States v. Quiver, 241 U.S. 602 (1916) 24

United States v. Rogers, 45 U.S. (4 How.) 567 (1846) 15

United States v. Walking Crow, ___ F.2d ___ (No. 77-1136, 8th Cir., 8-10-77), pet. for cert. pending, 77-5539 7,11,25,37,38

United States v. Wheeler, 545 F.2d 1255 (9th Cir., 1976) 3,6,7,36,39,40

Waller v. Florida, 397 U.S. 387 (1970) .... *passim*

Winton v. Amos, 255 U.S. 373 (1921) 17,38

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 30,32

Constitution, Statutes, Regulations and Rules:	Page
United States Constitution:	
Article I, Section 8, Clause 3	7,16,19,33
Fifth Amendment (Double Jeopardy Clause)	*passim*
Tenth Amendment	10,41
Eleventh Amendment	18
Fourteenth Amendment	23
Concurrent Resolution, 67 Stat. B 132	25
General Allotment Act (Dawes Act), 24 Stat. 388, as amended, 25 U.S.C. 331-358	21
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*	24,28,29
Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987, 25 U.S.C. 476 *et seq.*	22,28
Klamath Termination Act	25
Public Law 280, 67 Stat. 588; 18 U.S.C. 1162	6,27,28,29
Senate Bill 1437, Calendar No. 55, 11/15/77	27
Major Crimes Act, 23 Stat., 385, 18 U.S.C. 1153 and 3242	*passim*
Sherman Anti-Trust Act	12
18 U.S.C. 1151	27
18 U.S.C. 1152	27
18 U.S.C. 1153	*passim*
18 U.S.C. 1154	33,34
18 U.S.C. 1162	6,27
18 U.S.C. 3242	18,26,27
25 U.S.C. Ch. 14	25
25 U.S.C. 2	28
25 U.S.C. 13	29
25 U.S.C. 71	21
25 U.S.C. 144	27

	Page
25 U.S.C. 200	29
25 U.S.C. 331-358	21
25 U.S.C. 461	28
25 U.S.C. 476	28-29
25 U.S.C. 477	28-29
25 U.S.C. 636	29
25 U.S.C. 1301	6,26,28,29
25 U.S.C. 1302	24,29
25 U.S.C. 1321(a)	28
25 U.S.C. 1322(a)	28
25 U.S.C. 1323(b)	28
10 Stat. 270	26
15 Stat. 615	26
16 Stat. 566	21
19 Stat. 254	26
23 Stat. 385	27
32 Stat. 793	27
47 Stat. 336	27
48 Stat. 987	28
67 Stat. B 132	25
67 Stat. 588	6,27
80 Stat. 1100	27
82 Stat. 77	28
82 Stat. 80	27
90 Stat. 585	27
25 C.F.R. 11.1-11.306	29
17 Navajo Tribal Code 321	2
17 Navajo Tribal Code 351	2
Rule 31, Federal Rules of Criminal Procedure	33

Page

Miscellaneous:

American Indian Policy Review Commission, *Final Report*......37,38,40,41

Federal Indian Law (1958)...... 12

Justice and the American Indian, Library of Congress, #74-76967, Vol. 5, Ch. 2...... 39

Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 Notre Dame Law, 600, 613-614, n. 107......12,36

The Wall Street Journal, December 28, 1976 39

Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev., 387, 406 (1974)......41,45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA,
Petitioner,

-vs-

ANTHONY ROBERT WHEELER,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

WHETHER SUCCESSIVE PROSECUTIONS FOR THE SAME OFFENSE IN THE INDIAN TRIBAL COURT AND THE FEDERAL DISTRICT COURT ARE ALLOWED UNDER THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

STATEMENT OF THE CASE

FACTS

During the evening of October 16, 1974, a Navajo tribal police officer and a Bureau of Indian Affairs (B.I.A.) investigator arrested the respondent as he sat in his pickup truck located within the fenced compound of the B.I.A. high school, northwest of the LDS Church, Many Farms, Arizona, within the confines of the Navajo reservation. (A. 14, 19, 22).

While at the crime scene, the respondent was advised of his rights and volunteered statements regarding the incident and the female victim. (A. 15, 17-18, 19-23). He was then placed in the Navajo tribal jail, Chinle, Arizona, and charged by the tribal police officer with disorderly conduct (DC) in violation of Title 17-351 of the Navajo Tribal Code. (A. 8).

The next day the B.I.A. officer investigated the rape complaint and obtained a statement from the respondent at the Navajo tribal jail. (A. 20-21, 23).

On October 18, 1974, the tribal officer filed a complaint with the Navajo tribal court, Chinle, Arizona, charging the respondent with contributing to the delinquency of a minor (CDM), in violation of Title 17-321 of the Navajo Tribal Code. (A. 7). Both the CDM and DC complaints stemmed from the above described incident. (A. 7-8, 27). Following his guilty plea to both charges on October 18, 1974, the respondent was convicted and sentenced by the tribal court. (A. 9-10).

DISTRICT COURT PROCEEDINGS

On May 21, 1975, the respondent was indicted in the United States District Court for the District of Arizona for assault concerning the incident of October 16, 1974, in violation of 18 U.S.C. 1153 (A. 11). After the assault indictment was challenged by the respondent on grounds not relevant to this case, the Grand Jury returned a superseding indictment on November 19, 1975, charging the respondent with statutory rape, in violation of 18 U.S.C. 1153 (A. 12).

On the morning of trial, February 5, 1976, the respondent produced certified copies of his Navajo tribal court convictions and moved to dismiss the indictment on double jeopardy grounds. (A. 25-26, 28, 31). The prosecution conceded that the statutory rape indictment involved the same facts as the tribal court convictions (A. 27) and admitted that this was the first time that it had heard that the respondent had been prosecuted in tribal court (A. 26). After rejecting the dual sovereignty exception recognized in *United States v. Lanza,* 260 U.S. 377 (1922), the district court granted the respondent's motion and dismissed the indictment on double jeopardy grounds. (A. 29-32).

COURT OF APPEALS

The Court of Appeals for the Ninth Circuit affirmed the District Court judgment on December 2, 1976. *United States v. Wheeler,* 545 F.2d 1255 (9th Cir., 1976) (Pet. App. A). The Court stated that the "dual sovereignty" rationale of *Moore v. Illinois,* 55 U.S. (14 How.) 13 (1852) has been narrowly construed and this Court "has never applied it outside of the federal court and state court context", citing *Grafton v. United States,* 206 U.S. 333 (1907) and *Waller v. Florida,* 397 U.S. 387 (1970). *Id.* 1257. The Court reasoned that although Indian tribes maintain a "semi-independent position" within the borders of the United States, they are arms of the federal sovereign and, unlike states, are subject to the "complete plenary control" of the federal government. *Id.* 1257. (Pet. App. A, p. 5a). Based on this reasoning, the Court held that Indian tribal courts and federal district courts are (1) "not arms of separate sovereigns and, therefore, an individual cannot be tried for the same offense" in both courts, and (2) that the double jeopardy guarantee was violated by prosecution of the respondent in federal district court for the greater charge of statutory rape after he had been tried in Indian tribal court for the lesser included offense of contributing to the delinquency of a minor. *Id.* 1256, 1258. (Pet. App. A, 1a-2a, 7a-8a).[1]

SUMMARY OF ARGUMENT

Successive prosecutions in the Indian tribal court and the federal district court are barred by the Double Jeopardy Clause of the Fifth Amendment because these courts are arms of the federal sovereign.

A. The dual sovereignty exception to the Double Jeopardy Clause allows successive prosecutions *only* by state and federal sovereigns. In the federal district court, such prosecutions are brought only in exceptional circumstances and only after a finding of compelling reasons by the Attorney General.

1. The dual sovereignty exception was first established as a rule of law in the mid-nineteenth century. See *Moore v. Illinois,* 55 U.S. 13 (1852), and authorities cited therein. This exception became firmly established in our federal system of government when *United States v. Lanza,* 260 U.S. 377 (1922) was confirmed by *Bartkus v. Illinois,* 359 U.S. 121 (1950) and *Abbate v. United States,* 359 U.S. 187 (1950).

2. The Court has never extended the dual sovereignty exception beyond the state-federal arena. In *Grafton v. United States,* 206 U.S. 333 (1907), the Court refused to extend it to

---

[1] The Court also held that contributing to the delinquency of a minor is a lesser included offense to statutory rape. 545 F.2d at 1258 (Pet. App. A. 7a-8a). The petitioner does not present this as a question for this Court to answer. (Pet. 6, n. 3).

the United States territories, which are self-governing arms of the federal sovereign. *Grafton* was then cited as controlling when the Court refused to extend the doctrine to the state-like territory of Puerto Rico in *Puerto Rico v. The Shell Co.,* 302 U.S. 253 (1937).

The Court has consistently voiced a lack of sympathy for the exception as evidenced by the language of the prevailing opinion in *United States v. Lanza,* p. 377, supra, and in the recent opinion of this Court in *Rinaldi v. United States,* ____ U.S. ____, No. 76-6194 (11-7-77), 22 Cr.L. 4061. In recognition of the Court's distaste for successive trials, the Department of Justice has long exercised the Petite policy. This policy prohibits successive trials in the state and federal arena and within the federal system itself absent a finding by the Attorney General of compelling reasons therefore. 22 Cr.L. 4062, n. 5.

3. This Court has long recognized that Indian tribes are not sovereign like states. They are wards of the federal government without sovereign title to their lands and are subject to the plenary powers of Congress. This was recognized in *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), and recently in *United States v. Antelope,* 430 U.S. 641 (1977).

4. Viewed in perspective, it is clear that the judicial history of Indian tribes in America reflects their constantly changing status as federal wards subject to the plenary power of Congress. *United States v. Kagama,* 118 U.S. 375 (1886), recognized that there are only two sovereigns under the Constitution, states and the federal government, and that Indian tribes come under the Constitution and are within the federal territory. Pursuant to its *plenary legislative power,* Congress can control every phase of tribal life, including tribal existence and self-government, without judicial restraint. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). Only absent contrary federal law can the Indian tribes regulate their internal affairs. In cases following *Kagama,* such as *Cherokee Nation v. The Southern Kansas Railway Co.,* 135 U.S. 641 (1890) and *Talton v. Mayes,* 163 U.S. 376 (1896), the

Court did not sway from the basic principles of *Kagama*, although in expansive dicta in *Talton*, it used the notion of inherent sovereignty to characterize the source of tribal power to govern internal matters not already controlled by applicable treaties and federal law. *Id.* 379-384.

5. During this century, Courts have consistently recognized that the federal government has generally expanded its influence and control over Indian tribes. As a result, although tribes have vestiges of sovereignty based upon their pre-Constitutional existence, in reality, they and their courts are closely supervised arms of the federal sovereign subject to the complete plenary control of the federal government. Many courts, including the Court in *Colliflower v. Garland*, 342 F.2d 269 (9th Cir., 1965), have held that tribal courts are arms of the federal sovereign.

The evolution and expansion of federal legislative control over tribal courts is evidenced by (1) the Major Crimes Act expansion (18 U.S.C. 1153); (2) the vesting of exclusive criminal jurisdiction over tribes in state governments under Public Law 280 (67 Stat. 588; 18 U.S.C. 1162); (3) the application of the Bill of Rights and the reduction of the penalty power of tribal courts by the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.); and (4) the plethora of controlling federal law contained in Title 25 United States Code and Volume 25 Code of Federal Regulations. Under the circumstances, the Court of Appeals for the Ninth Circuit was correct in concluding that tribal courts are not states, but arms of the federal sovereign. *United States v. Wheeler*, 545 F.2d at 1258 (Pet. App. A. p. 6a).

6. Since World War II, the Court has continued to recognize that tribes are not sovereign like states. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Court attempted to place the confusing notion of inherent tribal sovereignty in its historical perspective when it characterized it as a "platonic notion", a "moot question . . . of little more than theoretical importance" and not a means for reaching a "definitive resolution of the issues". *Id.* 172. Instead, in

McClanahan, at 172-181, and cases thereafter, the Court has relied upon applicable treaties, statutes, and laws to resolve disputes concerning the tribes. In *Keeble v. United States*, 412 U.S. 205 (1973), the Court held that an Indian prosecuted pursuant to 18 U.S.C. 1153 is entitled, like any other defendant tried in federal district court under federal law and procedure, to a lesser included offense instruction although the offense is within the exclusive jurisdiction of tribal court and is not contained in the United States Code; in *United States v. Mazurie*, 419 U.S. 544 (1975), the Court held that Congress has power under the commerce clause, Art. I §8(3), to delegate to Indian tribes the authority to enact a tribal ordinance to control liquor sold in the Indian country; and in *United States v. Antelope*, 430 U.S. 641 (1977), the Court held that Indian defendants are subject to prosecution under 18 U.S.C. 1153 only because they are wards of the federal guardian. They are not racially disadvantaged and denied equal protection of the law because, like all other federally prosecuted defendants, they are treated equally in the federal forum. *Id.* 647-650.

7. The petitioner makes a political policy argument when it asks this Court, because of the "undesirable consequences" that it foresees as resulting from an affirmance of *Wheeler*, to extend the strongly criticized and narrowly applied dual sovereignty exception to the tribal-federal setting. Although thousands of cases are prosecuted each year in tribal courts, only one case, *United States v. Walking Crow*, ____ F.2d ____ (No. 77-1136, 8th Cir., 8-10-77), petition for cert. pending, #77-5539, has held that Indian tribes are not arms of the federal sovereign for double jeopardy purposes. (Appendix, Supplemental Memorandum for the United States). Undesirable consequences, such as the possibility that tribal independence might be further restricted by new legislation enacted to prevent Indians from *avoiding* a Major Crimes Act prosecution by subjecting themselves to tribal court prosecution is not a significant problem. Even if it were, the legislative branch, not the judicial, must provide a solution as it has done in the past.

B. The facts of the case outlined above clearly show that the various exceptions to the Double Jeopardy Clause stated in *Jeffers v. United States,* ____ U.S. ____ , #75-1085 (1977), plurality opinion, slip op. 13-15; and in *Brown v. Ohio,* ____ U.S. ____ , #75-6933, slip op. 8, n. 7, as well as the exception stated by Mr. Justice Brennan in his concurring opinion in *Ashe v. Swenson,* 397 U.S. 436 at 453, n. 7, do not apply. The first exception would apply only "when the facts necessary to the greater [charge] were not discovered despite the exercise of due diligence before the first trial". *Jeffers v. United States,* slip op. 14; *Brown v. Ohio,* slip op. 8, n. 7. In the respondent's case, however, all facts necessary to the statutory rape charge were known before the tribal court prosecution. (A. 15-21).

The next exception is noted by Mr. Justice Brennan in his concurring opinion in *Ashe v. Swenson,* 453, n. 7, supra. He suggests that when two separate jurisdictions within a single sovereign do not have concurrent jurisdiction over the same offense they can both punish a defendant because he will not be twice in jeopardy for the same offense. *Grafton v. United States, supra, Puerto Rico v. The Shell Co., supra,* and *Brown v. Ohio, supra,* have eliminated the viability of this argument.

Another exception that does not apply to the respondent's case is the waiver exception announced in *Jeffers v. United States,* ____ U.S. ____ , #75-1805 (1977), at slip op. 15-16. This exception allows a second trial where a defendant expressly requests separate trials although a single trial on the greater and lesser included charges would have been proper. The respondent neither asked for separate trials on the greater and lesser offenses nor in opposition to trial together, failed to raise the issue that one offense might be a lesser included offense of the other.

Finally, the new tribal-federal dual authority exception proposed by the petitioner for the unique tribal-federal setting must also fail. It is merely a new title to the old federal-territorial and state-municipal exceptions rejected by the Court in *Grafton* and *Waller.*

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

SUCCESSIVE PROSECUTIONS IN THE INDIAN TRIBAL COURT AND THE UNITED STATES DISTRICT COURT ARE BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH ADMENDMENT BECAUSE THESE COURTS ARE ARMS OF THE SAME SOVEREIGN.

A. The history of the dual sovereignty exception to the Double Jeopardy Clause shows that it has been applied only in the state-federal context and has been given only narrow application.

1. Constitutional development of the dual sovereignty exception:

The Constitutional guarantee against double jeopardy stems from the Fifth Amendment provision that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". The "dual sovereignty" exception to this guarantee emerged in the 19th Century in *Fox v. Ohio,* 46 U.S. (5 How.) 410 (1847); *United States v. Marigold,* 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois,* 55 U.S. (14 How.) 13 (1852). This doctrine allows successive state and federal prosecutions of a defendant for the same crime. In *Moore v. Illinois, supra,* the Court announced the definitive statement[2] of the rule:

---

[2] This characterization of the rule was made by the Court in *Bartkus v. Illinois,* 359 U.S. 121, 131 (1950).

> "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both . . . that either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this Court has decided, in the case of *Fox v. The State of Ohio*, ... that a State may punish the offense of uttering or passing false coin, as a cheat or fraud practised on its citizens; and, in the case of the *United States v. Marigold*, . . . that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States." 55 U.S. (14 How.) 19-20.[3]

In *Abbate v. United States*, 359 U.S. 187, 190-194 (1959), as well as the companion case of *Bartkus v. Illinois*, 124-136, supra, the constitutional development of the two sovereigns doctrine was traced. In *Abbate*, the Court noted that in 1922, in *United States v. Lanza*, 260 U.S. 377, it was recognized that states obtain their general sovereign powers to make acts criminal from the powers originally belonging to and reserved for them by the Tenth Amendment to the Constitution.[4] *Id.* 193, and that "States under our federal system have the principal responsibility for defining and prosecuting crimes. See *Screws v. United States*, 325 U.S. 91, 109; *Jerome v. United States*, 18 U.S. 101, 104-105." *Id.* 195.[5]

2. The dual sovereignty doctrine has been applied only in the state-federal setting and has been given narrow application.

The petitioner cites no case of this Court that has ever applied the dual sovereignty exception outside of the state-federal setting.[6] In fact, attempts to extend the doctrine outside of this arena have been consistently rejected by the Court. In *Grafton v. United States*, 206 U.S. 333 (1907), the Court prohibited a second prosecution of a United States Army soldier in the Philippine territorial court after he had been tried for the same acts in the military court. In *Waller v. Florida*, 397 U.S. 387 (1970), the Court prohibited successive prosecutions in the municipal and state courts of Florida. In both *Grafton* and *Waller* the Court reasoned that military and territorial courts and state and municipal courts were both arms of the same sovereigns respectively. Being arms of the same sovereign, a second prosecution for the same crime was prohibited under the Double

---

[3] *Moore* held that successive state and federal prosecutions of the defendant for harboring a slave were valid under the two sovereigns exception. 55 U.S. (14 How.) at 20.

[4] The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[5] In *Screws*, p. 109, supra, the Court said that "[o]ur national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States". The dissent in *Bartkus*, p. 157, supra, also recognized that "in purely local matters the power of the States is supreme and exclusive".

[6] *United States v. Walking Crow*, ___ F.2d ___ (77-1136, 8th Cir., 8/10/77), cited by the petitioner at pp. 29 and 37 of his brief is the only case to hold that the dual sovereignty exception applies outside of the federal-state arena.

Jeopardy Clause of the Fifth Amendment. *Grafton v. United States,* pp. 352, 354-355, supra; *Waller v. Florida,* pp. 394-395, supra.[7]

Further, from the Court's refusal to apply it to the territory of Puerto Rico, it is evident that the dual sovereignty exception to the Double Jeopardy Clause is applicable only in the state-federal setting. In *Puerto Rico v. The Shell Co.,* 302 U.S. 253, 264 (1937), the Court ruled that the Sherman Anti-Trust Act did not bar the territory of Puerto Rico from adopting and enforcing its own anti-trust laws. The Court, relying on *Grafton v. United States,* supra, reasoned that such conduct would not offend the Double Jeopardy Clause because both the Puerto Rican and federal courts, whether exercising federal or local jurisdiction, are "creations emanating from the same sovereignty." *Id.* 264-265.

It is significant to note that although in 1937 the Court recognized that Puerto Rico had a degree of "autonomy similar to that of the states", *Puerto Rico v. The Shell Co.,* p. 262, supra, the territory was and still is considered to be a creature of the United States within the meaning of the dual sovereignty exception to the Double Jeopardy Clause. Unlike the lesser

---

[7] In *Grafton* the Court used language strikingly similar to that repeatedly used by this Court to characterize the tribal-federal relationship discussed in parts (3)-(7), infra, when it said that "the jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount." *Id.* 354. See also *Cherokee v. Southern Kansas Railway Co.,* 135 U.S. 641, 653-657 (1890), and *Lone Wolf v. Hitchcock,* 87 U.S. 553 (1903). Striking a theme similar to *Grafton* and *Waller,* in its 1958 publication *Federal Indian Law* (1958) at p. 450, the Department of the Interior concluded that "[i]n effect, then, an Indian tribe bears a relation to the Government of the United States similar to that which a Territory bears to such Government and similar again to that relationship which a municipality bears to a State". Periodic revisions and updating of this treatise, originally authored by Felix Cohen in 1940, have confused the notion of tribal sovereignty. See Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?,* 51 Notre Dame Law. 600, 613-614 n. 107.

degree of self-governing powers vested in Indian tribes by the federal government,[8] the Court recognized that Congress, through various legislative enactments, gave to Puerto Rico full powers of local self-government, "[t]he effect [of which] was to confer upon the territory many of the attributes of quasi-sovereignty possessed by the states . . ." *Id.* 262. The Court noted that Puerto Rico was given "immunity from suit without their consent",[9] had a separate executive, legislative and judicial system and was a "body politic". *Id.* 262. The Court further observed that, absent express Congressional legislation to the contrary, there was nothing that suggested a congressional intent to limit Puerto Rico's power to legislate on local or internal matters. In fact, evidence of the opposite intent—to allow Puerto Rico local powers of self-government in areas not covered by federal law—was outlined in that opinion. *Id.* 260-263. Nevertheless, because it is a territory and creature of the United States, subject to its plenary powers, the Court ruled that citizens of Puerto Rico cannot be subjected to the dual sovereignty exception to the Double Jeopardy Clause. *Id.* 264-265.[10]

Throughout the decisions recognizing and construing the scope of the dual sovereignty exception, this Court has repeatedly emphasized that the exception should be narrowly applied. In

---

[8] See discussion, parts (4) and (5), infra.

[9] Because Indian tribes are not sovereign entities, they are immune from suit *only* because of Congressional policy. See *United States v. United States Fidelity Co.,* 309 U.S. 506, 512 (1940), discussed at p. 18, infra.

[10] Although in 1952, in conferring Commonwealth status on Puerto Rico, "Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States", *Examining Board v. Flores de Otero,* 426 U.S. 572, 597 (1976), Congress still possesses plenary control, although recognized as ineffective, over territorial governments. *Id.* 596. *Puerto Rico v. The Shell Co.,* supra, and *Grafton v. United States,* supra, still prevent the application of the Dual Sovereignty exception to these arms of federal sovereign.

Rinaldi v. United States, ____ U.S. ____ (No. 76-6194, 11-7-77); 22 Cr.L. 4061, at 4063, this Court affirmed its "continuing sensitivity to the fairness implications of the multiple prosecution power". Based upon such concern and upon the urging of the Petite policy by the Solicitor General,[11] it summarily remanded the petitioner's case to the District Court for dismissal of his federal indictment and conviction because of his earlier State court conviction for the same offense.

In reaching this decision, the Court recognized that "the Petite policy was formulated by the Justice Department in direct response to this Court's opinions" in *Bartkus* and *Abbate.* It also relied on the statement of Mr. Chief Justice Taft in *United States v. Lanza,* 260 U.S. 377, 383, that successive prosecutions by the state and federal systems for the same offense would not occur except "in instances of peculiar enormity, or where the public safety demanded extraordinary vigor," and on the statement of the Court in *Bartkus v. Illinois,* p. 138, supra, that "[t]he greatest self-restraint is necessary when the federal system yields results with which a court is in little sympathy." 22 Cr.L. at 4063.

In addition to the barrier presented by *Grafton, Waller* and *Puerto Rico v. The Shell Co.,* this Court's continuing concern for and lack of sympathy with the dual prosecution doctrine, as well as the Justice Department's continuing vigilance over the

---

[11] As this Court stated in *Rinaldi,* the Petite policy is a long standing policy of the federal government, recognized by this Court in *Petite v. United States,* 361 U.S. 529 530-531 (1960), against multiple prosecutions for the same act, whether they be either successive state and federal prosecutions or "successive federal prosecutions arising out of the same transaction", as occurred in *Petite;* in order for a valid federal prosecution, the Attorney General must first find that the prosecution should occur because "the reasons are compelling". *Id.* 4062, n. 5. There is no evidence in this case that the prosecutor first obtained Justice Department approval for the second prosecution of the respondent in federal court. In fact, the prosecutor's candid admission the morning of trial that he had just been made aware of the earlier tribal court conviction infers that no authorization had been obtained. (A. 26)

doctrine, strongly dictates that it should not be applied to the tribal-federal setting.

3. This court has long recognized that Indian tribes are not states and are not truly sovereign.

Indian tribes neither exist in the general territorial sense like states, nor have inherent title to or dominion over their lands. Instead, Indians occupy their lands because "it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority". *United States v. Rogers,* 45 U.S. (4 How.) 567, 572 (1846), cited with approval in *United States v. Kagama,* 118 U.S. 375, 380, 381-382, (1886). As early as 1823, the Court held that Indians were considered mere occupants without title to the land they possessed. *Johnson v. McIntosh,* 21 U.S. 542, 573-574, (1823). In *Johnson,* the Court stated that through discovery, conquest, session, treaties and history the United States obtained exclusive title to its territory and with it the sole right to eliminate Indian occupancy either by purchase or by conquest. Indeed, in *Mackey v. Coxe,* 59 U.S. (18 How.) 100, 103 (1855), the Court said of the Cherokee territory, "[i]t is not a foreign, but a domestic territory,—*a territory which originated under our Constitution and laws.*" (Emphasis added.) Such title and right is not subject to judicial review. *Johnson v. McIntosh,* pp. 587-589, supra; *United States v. Kagama,* p. 381, supra; *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903).[12]

---

[12] Current Indian title to land flows from Congress by legislative grant, not from any claim based on inherent tribal sovereignty. Because the United States acquired title to all lands, as noted above, only when lands are returned to the tribes through treaty or statute must they be compensated for a subsequent taking. See *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279, 285-289 (1955), and *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) for an exhaustive treatment of this issue.

Although the petitioner notes that Indian tribes are treated *in pari materia* with states and foreign nations under the commerce clause of the Constitution, Article I, §8(3),[13] in 1831 this Court recognized that in fact Indian tribes are not sovereign states or nations, but wards of the federal sovereign. In *Cherokee Nation v. Georgia,* 30 U.S. 1, at 17-18 (1831), Chief Justice Marshall defined their status when he said:

> "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; . . . They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

Because of this lesser status, the Court in *Cherokee* then held that, unlike suits between sovereign states, Indian tribes could not bring suit in the courts of the United States. *Id.* 20.

It is undisputed that the plenary authority of Congress over Indian tribes has always existed and has been exercised in a pervasive and unrestricted manner. Congress at any time may either alter or completely remove such jurisdiction and even

---

[13] This Clause gives Congress the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian tribes".

abrogate treaties without restriction or judicial restraint. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903).[14]

The Court in *Winton v. Amos,* 255 U.S. 373 at 391-392 (1921), further recognized that Indian tribes are not sovereign like states when it said that:

> "[i]t is thoroughly established that Congress had plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease."

Unlike the sovereign state and federal entities, Indian tribes do not have the inherent power to exempt themselves from suit. Tribal immunity from suit does exist, however, not because they are sovereign like states, as suggested by the petitioner at p. 20 of its brief, but simply because the Indian tribes are dependent arms of the federal sovereign and Congressional policy presently wills that they be immune from suit. *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 512-513 (1940). In making this analysis the Court, citing *Cherokee Nation v. Georgia*, supra, said "[t]hese Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did". *Id.* 512.[15] Unlike tribal immunity from suit, which exists solely as a matter of political policy,[16] the sovereign immunity of states from suit is constitutionally founded in the Eleventh Amendment.[17]

---

[14] In *Lone Wolf,* the Court noted that "Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interest, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians . . . Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government . . . [L]egislative power [exists to] pass laws in conflict with [and to abrogate] treaties made with the Indians." *Id.* 565-566. The Court then refused to consider the Indian claim that their land was being obtained by fraudulent misrepresentations and concealment, stating: "We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complainant has made, and that the legislative branch of the government exercised its best judgment in the premises. In an event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation . . . *relief must be sought by an appeal to that body for redress and not to the courts".* (Emphasis added.) *Id.* 568. See also *The Cherokee Tobacco,* 78 U.S. (11 Wall.) 616, 621 (1870); *Head Money Cases,* 112 U.S. 580, 599 (1884); *Stephens v. Cherokee Nation,* 174 U.S. 445, 483 (1899) for examples of this principle.

4. The evolution of Congressional plenary control over Indian tribes has long been evident and manifests the political reality of national expansion and the changing moods of society towards tribal self-government.

In *United States v. Kagama, supra*, the Court traced the evolution of Congressional control over Indian tribes in sustaining the legislative withdrawal of tribal jurisdiction over major offenses pursuant to the "Seven Major Crimes Act" of 1885 (23 Stat. 385; now 18 U.S.C. 1153 and 3242). The Court

---

[15] The Court based this pronouncement upon the statement of Chief Justice Marshall in *Cherokee Nation*, which recognized that Indian tribes are wards of the United States and that the intercourse between the United States and the tribes is vested in the federal sovereign. *Cherokee Nation* was also cited in *United States v. Kagama*, supra, at 382, for the proposition that Indian tribes cannot sue in the Supreme Court since they are not States or nations.

[16] Tribal immunity from suit was recently applied in *Puyallup Tribe v. Washington Game Department*, ___ U.S. ___ (No. 76-423, 1977), although in his concurring opinion the "continuing vitality" of the doctrine was questioned by Mr. Justice Blackmun.

[17] The Eleventh Amendment to the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

found that the enactment of the Act was a valid exercise of Congress' political control over the internal affairs of United States territory, *not* an exercise of the commerce power.[18] The Court expressly laid to rest any claim that Indian tribes are sovereign like states or in any way sovereign in their relation to the federal government:

> "But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.* The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress . . . But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises . . . from the ownership of the Country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else. (Citation omitted.)" (Emphasis added.) *Id.* 379-380.

In very clear language that is equally valid today, *Kagama* recognized that as a matter of law tribes are wards of the federal government subject only to the will of Congress:[19]

---

[18] The Court reasoned that the Seven Major Crimes Act was not based on the commerce clause, Article 1, §8(3), n. 13, supra, because the language of the Act in no way mentioned commerce. The Court also said that tribes are not sovereign states or foreign nations, but rather totally dependent wards of the United States, subject only to the political will of Congress. *Id.* 378-385. In *United States v. Antelope*, 430 U.S. at 648 (1977), discussed at pp. 33-34, infra, this Court, citing *Kagama*, said that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country".

[19] In *United States v. Antelope*, this Court recognized that tribes are still wards of the federal guardian. 430 U.S. at 647, n. 8; 648.

> "These Indians *are* wards of the nation. They are communities *dependent* on the United States. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." (Emphasis in opinion.) *Id.* 383-384.

Speaking of the guardian-ward relationship[20] and of the lack of sovereign tribal power, the Court also said:

> "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone [the United States] can enforce its laws on all the tribes." *Id.* 384-385.

It defined this relationship as follows:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; *not as States, not as nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the

---

[20] The Court characterized the relationship of the various Indian tribes to the people of the United States as being "an anomolous one and of a complex character". *Id.* 381.

> Union or of the State within whose limits they resided." (Emphasis added.) *Id.* 381.[21]

The Court further recognized that because Indian tribes have no sovereignty and are living in "a part of the territory of the United States", they have no jurisdiction over a white man who commits a murder within their reservation. *Id.* 380. This is the present status of the law and states have jurisdiction over crimes between non-Indians that occur in the Indian Country. See *United States v. McBratney,* 104 U.S. 621 (1882); *Draper v. United States,* 164 U.S. 240 (1896) and *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946). The *McBratney* doctrine is discussed in *United States v. Antelope,* 643-644, 648, supra.

As an example of Congressional plenary power over tribes, the Court noted that in 1871 Congress had unilaterally proclaimed that it would no longer deal with the tribes by use of the treaty powers, but instead would govern them by acts of Congress. *Id.* 382.[22] Such an act clearly dispels any suggestion that dealing with tribes by treaty evidences that they are sovereign like states or foreign nations, a status originally dispelled by *Cherokee Nation v. Georgia,* supra.

Shortly after this Court's decision in *Kagama,* another striking example of Congress' plenary power over tribal existence occurred. In 1887, Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. 331-358, popularly known as the Dawes Act. This Act authorized the division of reservation land among tribal members and implemented the new policy of assimilating Indians as citizens into American society.[23]

---

[21] This theme of tribal independence over internal affairs was later reiterated when *Kagama* was cited in *Talton v. Mayes,* 163 U.S. 376 (1896), discussed, pp. 22-23, infra. The petitioner, however, incorrectly places great reliance on *Talton* and this type of language for the proposition that tribes are sovereign like states. Pet. brief, pp. 27-31.

[22] In this proclamation, Congress said "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired". 16 Stat. 566 (25 U.S.C. 71).

In 1890, shortly after the enactment of the Dawes Act, the Court again firmly laid to rest the claim that an Indian tribe is inherently sovereign in the sense that the United States or a state is sovereign and, as such, is entitled to exercise the power, jurisdiction and functions of a sovereign state over the territory it occupies. *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 648 (1890). In rejecting the tribal claim that Congress had no power to take tribal land by eminent domain, the Court, citing the "wards of the nation" principle first announced by Chief Justice Marshall in *Cherokee Nation v. Georgia*, p. 16, supra, said that:

> "The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States." *Id.* 653.[24]

In 1896, the Court was again confronted by a Cherokee Indian claim in *Talton v. Mayes*, 163 U.S. 376. In *Talton*, a tribal member asked the Court for habeas corpus relief, claiming that he was denied due process of law under the Fifth and Fourteenth

---

[23] This policy of assimilation lasted until 1934, when it was reversed by the enactment of the Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 987, 25 U.S.C. 476 *et seq.*, discussed in Part 5 infra.

[24] In support of this statement, the Court fully reviewed the decisions from *Cherokee Nation* to *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886), where the Court, after saying "that the United States is a sovereign nation limited only by its Constitution", said that "[Indian tribes] fall within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe". *Id.* 653-655.

Amendments because he was indicted for murder by a five man tribal grand jury, contrary to the requirements of the indictment clause of the Fifth Amendment. The Court denied that the writ should issue. In denying relief, the Court premised its opinion by reiterating that tribes exist only as wards of the federal government:

> "*By treaties and statutes of the United States* the right of the Cherokee Nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized." (Emphasis added.) *Id.* 379-380.

After finding no apparent extension of the Fifth Amendment to the tribe in the applicable treaties and statutes, the Court reasoned that the difference between tribal and federal indictment procedures did not rise to the level of a violation of due process of law under the Fifth and Fourteenth Amendments, which then applied only as a limit on the powers exercised by the federal government. *Id.* 384. Instead, the Court characterized the Indian petitioner's claim as merely an "argument of inconvenience" based upon his being a tribal member. *Id.* 384.

Although in dicta the Court suggested that the *source* of tribal self-government existed before the Constitution, it nevertheless recognized the reality of the wardship status of Indian tribes when it said that *Kagama* had "review[ed] the whole subject" and had concluded that tribes are not states or nations. The Court then said:

> "[t]rue it is that in many adjudications of this Court the fact has been fully recognized that, although possessed of these attributes of local self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.

Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, where the cases are fully reviewed." *Id.* 384[25]

United States v. Quiver, 241 U.S. 602 (1916), repeatedly cited by the petitioner in part B(1) and (2) of its brief, pp. 17-35, in support of the claim that tribes are sovereign like states, actually supports the respondent's position. In *Quiver*, the Court held that the federal court could not prosecute adultery between Indians occurring within the reservation because Congress, in the exercise of its plenary control over the Indian wards, had not expressly and clearly provided that such an offense should be prosecuted in federal court. *Id.* 605-606.[26] In reaching this conclusion, the Court inferred that the existence and operation of tribal custom and law without federal interference resulted from Congressional policy, not from any exclusive jurisdiction or inherent sovereignty of the tribes as suggested by the petitioner in part B(1) of his brief.[27]

---

[25] This full review of cases in *Cherokee Nation v. Kansas Railway* is discussed in n. 24, supra. As has already been noted, Congress can unilaterally modify, reduce, or terminate the powers of Indian tribes without judicial restraint, though such may be contrary to existing treaties and laws. *Lone Wolf v. Hitchcock*, 565-566, supra. Such a reduction occurred as a result of the enactment of the Indian Civil Rights Act of 1968, (ICRA), 25 U.S.C. 1301 *et seq.*, which extended the Bill of Rights to all of the diverse Indian reservations in the United States and reduced the jurisdiction of tribal courts to petty offenses only (25 U.S.C. 1302(7)). This enactment, although intended to further tribal self-government, in reality reduced tribal reliance on their unique traditions and customs and, hence tribal "sovereignty".

[26] This general rule of statutory construction was recognized in *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174 (1973) when the Court said that "[d]oubtful expressions [in treaties] are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. (Citation omitted.)."

[27] Speaking of the plenary power of Congress over tribes, the Court stated, "[a]t an early period it became the settled policy of Congress to permit the personal and domestic relations of Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws." *United States v. Quiver*, 603-604, supra.

5. The pervasive exercise of plenary authority over Indian tribes establishes that tribes are in essence closely supervised arms of the federal sovereign.

Although various courts have discussed the exclusive jurisdiction of tribes over their internal affairs in terms of "sovereignty", they have ultimately recognized that such a notion does not reflect the true basis and reality of tribal government.[28] In *Colliflower v. Garland*, 342 F.2d 369, 376-379 (9th Cir., 1965), the Court noted that tribal courts are, in essence, arms of the federal sovereign and, under *Ex Parte Crow Dog*, 109 U.S. 556 (1883), only in the absence of federal law to the contrary do Indian tribes have residual exclusive jurisdiction over their internal affairs. In *Colliflower*, as well as in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 96 (8th Cir., 1956) and *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir., 1972), cited and relied on by the petitioner at pp. 29 and 37 of its brief it was recognized that tribal power over internal affairs—"inherent sovereignty"—included the right to establish tribal courts to define and punish criminal conduct by tribal members. Although recognizing this inherent power, *Colliflower* and *Iron Crow* concluded that such power is insignificant in view of the plenary power of Congress to expand, contract and even eliminate tribes and tribal courts, a power that Congress cannot exercise over states. *Kills Plenty* pretermitted the issue. 466 F.2d at 243.[29]

In a very thorough and lucid opinion, the Court in *Colliflower* held that:

---

[28] See discussion at p. 37, infra, of *United States v. Walking Crow*, ____ F.2d ____ (No. 77-1136, 8th Cir., 1977), petition for cert. pending #77-5539, the only case to hold that tribal and federal courts are arms of separate sovereigns.

[29] In 1953, by Concurrent Resolution, 67 Stat. B 132, Congress again adopted the policy of ending the status of Indians as wards of the United States. Thereafter, many tribes were terminated by statute. See 25 U.S.C. Ch. 14, which contains termination statutes. See also *United States v. Heath*, 509 F.2d 16 (9th Cir., 1974), discussing the Klamath Termination Act.

> "[i]n spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in light of their history, it is pure fiction to say that the Indian courts . . . are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains partial control over them. In *Iron Crow v. Oglala Sioux Tribe* . . . the Court held that comparable Indian courts 'have been authorized by federal legislative action' (231 F.2d at 94) and that 'federal legislative action and rules promulgated thereunder support the authority of the tribal courts'. (Id. at 96)." *Id.* 378-379.[30]

The evolution of the Major Crimes Act, 18 U.S.C. 1153 and 3242, is a classic example of the exercise of federal plenary power over Indian tribes. In *Ex Parte Crow Dog,* 109 U.S. 556 (1883), the Court vacated the federal territorial court murder conviction of Crow Dog, a Sioux Indian, because neither the 1868 treaty with the Sioux (15 Stat. 615), nor the 1887 agreement with the Sioux (19 Stat. 254), had repealed the federal statute (10 Stat. 270). In the Congressional interest of securing tribal self-government this latter statute had excluded from federal court jurisdiction offenses committed by one Indian

---

[30] Contrary to the urging of the petitioner at pp. 28-29 of its brief. *Iron Crow* in no way recognized that tribes are sovereign like states. In fact, 'Inherent sovereignty" was used in *Iron Crow* only to emphasize that there exists an inherent right in tribes to establish tribal courts to govern their internal affairs in areas not withdrawn by law. 231 F.2d at 94. Instead, after reviewing federal legislation controlling tribal courts, *Iron Crow* emphatically and realistically concluded that "[t]here can be little doubt . . . that Congress has actually authorized the establishment and operation of the Ogallala Sioux Tribal Court." *Id.* 96. In n. 8, p. 23-24 of its brief, the petitioner suggests that the distinction between Courts of Indian Offenses ("CFR courts") and Indian Tribal courts is significant. But Congress eliminated this distinction through 25 U.S.C. 1301(3) of the ICRA, which states: "(3) Indian Court means any Indian tribal court or court of Indian offense". The petitioner's characterization of the Navajo tribal court as a "true tribal court" is therefore meaningless and confusing.

against another Indian within the confines of the reservation. 109 U.S. at 568. In reaction to the apparent public indignation over the legislative withdrawal of jurisdiction which had effectively barred the territorial court from correcting what was considered to be an uncivilized and unjust tribal disposition of this serious matter, Congress passed the "Seven Major Crimes Act" in 1885. This Act, 23 Stat. 385, removed from the tribes and vested in the federal government exclusive jurisdiction over seven major crimes committed by one Indian against the person or property of another Indian or other person within the Indian Country.[31]

Since the enactment of the Seven Major Crimes Act in 1885, Congress, in the exercise of its plenary power, has expanded exclusive federal jurisdiction over major crimes to eight in 1903, ten in 1932, twelve in 1966, thirteen in 1968 and to fourteen in 1976.[32]

In further exercise of its plenary power Congress has also removed all criminal jurisdiction from specified tribal courts. In 1953, shortly after resolving to return to assimilating the Indians into American society, Congress enacted what is popularly known as Public Law 280, 67 Stat. 588, Title 18 U.S.C. 1162. This law unilaterally transferred to the courts of certain states exclusive jurisdiction over offenses by or against Indians in the

---

[31] The Seven Major Crimes were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. (23 Stat. 385; now 18 U.S.C. 1153 and 3242).

[32] Assault with a dangerous weapon was added in 1903, 32 Stat. 793; Incest and Robbery were added in 1932, 47 Stat. 336; Assault with Intent to Commit Rape and Carnal Knowledge were added in 1966, 80 Stat. 1100; Assault Resulting in Serious Bodily Injury was added in 1968, 82 Stat. 80; and Kidnaping was added in 1976, 90 Stat. 585. It is significant to note that should Congress enact the new and revised federal criminal code, currently S. 1437, federal jurisdiction will be further expanded to include 20 major crimes. See S. 1437, Calendar No. 555, 11/15/77, pp. 369-370, amending 25 U.S.C. §144, which carries forward 18 U.S.C. 1151, parts of 18 U.S.C. 1152, and the expanded version of 18 U.S.C. 1153.

Indian Country within those states. In addition, the Act authorized the remaining states to assume criminal jurisdiction upon compliance with certain requirements. Not until the enactment of the Indian Civil Rights Act in 1968, 82 Stat. 77, 25 U.S.C. 1301, *et seq.*, did Congress again reverse the policy the assimilation by amending Public Law 280 to first require the consent of Indian tribes before states could assume jurisdiction over criminal *and* civil matters of the tribes, 25 U.S.C. 1321(a), 1322(a), and 1323(b).

Another clear example of the pervasive nature of federal control over Indian tribes is the plethora of federal law enacted to control all areas of Indian affairs. This body of law, contained in Title 25 U.S.C., is so broad that it occupies an entire volume of the United States Code. In addition, 25 C.F.R. contains a massive volume of federal regulations concerning all aspects of tribal life, including Law and Order, Social Welfare, Tribal Government, Economic Enterprises, etc. These laws and regulations are bold testimony to the enormous and pervasive federal role in tribal activities—a role which did not exist when *Talton v. Mayes*, supra, was decided.

Pursuant to 25 U.S.C. 2, under the direction of the Secretary of the Interior the Commissioner of Indian Affairs is charged with the "management of all Indian affairs", including the Indian Reorganization Act of 1934, popularly known as the Wheeler-Howard Act.[33] Under the Act, Congress authorized the Indian tribes, subject to approval by the Secretary of the Interior, to organize as chartered federal corporations and to adopt constitutions and by-laws to implement this policy. 25 U.S.C.

---

[33] 48 Stat. 987, 25 U.S.C. 461, *et seq.*, discussed in n. 23, supra.

§§476 and 477.[34] Under 25 U.S.C. 13, the Secretary of the Interior is authorized to expend moneys "for the benefit, care, and assistance of Indians throughout the United States", including employment of Indian police and judges. Finally, pursuant to 25 U.S.C. §200, Indian tribes are required to "immediately" report to the Superintendent of the reservation whenever an Indian is incarcerated by the Tribe.[35]

One of the more recent examples of the pervasive nature of Congressional plenary power over tribal justice systems was the enactment of the Indian Civil Rights Act of 1968, (ICRA), Public Law 90-284, Title 25 U.S.C. §1301-1341. In addition to modifying Public Law 280, as discussed above, the Act unilaterally imposed upon the tribal justice system certain Constitutional rights that were previously unavailable to Indians in tribal courts.[36] As a result, by requiring all tribal governments to act with uniformity regarding fundamental rights, the Act further curtailed tribal self-government, culture and individuality.

---

[34] The adoption of the Navajo Tribal Constitution was authorized by 25 U.S.C. §636, subject to approval by the Secretary of the Interior. The Navajo Tribal Code under which respondent Wheeler was prosecuted for disorderly conduct and disturbing the peace was also adopted by the Tribe after approval by the Secretary of the Interior, pursuant to 25 CFR §11.1(e). See *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir., 1962), which traces the federal origin of the Navajo Tribal Code and recognizes the paramount authority of the federal government over Indian tribes.

[35] Federal Regulations on all aspects of Law and Order on Indian reservations are contained in 25 C.F.R. 11.1-11.306. The presence of a BIA officer at the scene of the respondent's arrest, October 16, 1974, typifys the pervasive federal control over tribal courts and law enforcement.

[36] The Constitutional rights applied to Indian reservations include the right to habeas corpus review in the federal court of detention under the authority of an Indian tribe, the right to counsel at the defendant's expense, the right to a jury trial, the guarantee of due process of law and the imposition of limits to the range of punishment that can be handed out by tribal courts to $500 or six months. This latter provision effectively reduced tribal courts to courts of petty offense jurisdiction only. 25 U.S.C. 1302.

6. Recent decisions involving disputes with Indian tribes have recognized that Indian tribes are not inherently sovereign like states.

Since World War II, this Court has been confronted with numerous disputes between states and Indian tribes where the claim has consistently been made that tribes are inherently sovereign. The Court, recognizing that this notion is confusing and that tribes are not sovereign like states, has refused to rely on such a contention. In *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), and the companion case of *Mescalaro Apache Tribe v. Jones,* 411 U.S. 145 (1973), the Court was urged to resolve tax disputes between the States of Arizona and New Mexico and the Navajo and Apache Tribes within these states respectively. The argument urged was that tribes are inherently sovereign and, therefore, free from any state taxation of tribal matters either on or off the reservation. The Court refused to rely on this theory.[37] In *McClanahan,* after observing that the inherent sovereignty doctrine first advanced in *Worcester v. Georgia,* 31 U.S. at 557 , supra, had been used by the Court only as a means of preventing the various states from extending their criminal and civil jurisdiction to Indian reservations, the Court recognized the established principle that Indian tribes owe their existence and vitality solely to the political department of the federal government. *Id.* 169.[38] After noting

---

[37] In *Mescalaro,* p. 148, supra, the Court said that "[g]eneralizations on this subject have become particularly treacherous. The conceptual clarity of . . . Marshall's view [of tribal sovereignty] in *Worcester v. Georgia* [31 U.S. (6 Pet.)] 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government".

[38] Quoting from *The Kansas Indians,* 5 Wall. 737 at 755 (1867), the Court said: " 'If the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, *then* they are 'a people distinct from others' . . . [They are] governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority' ". (Emphasis added) *Id.* 169. This review was reiterated in *United States v. Antelope,* pp. 646-647, n. 7, supra.

that the tribal sovereignty doctrine has undergone considerable evolution, it rejected any further reliance on the doctrine stating, "[t]he modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power". *Id.* 172. The Court also noted that "[t]he extent of federal preemption and residual Indian sovereignty in the total absence *of federal treaty obligations or legislation is therefore now something of a moot question . . . [and] . . . generally of little more than theoretical importance . . .*" (Emphasis added) *Id.* 172, n. 8.

The Court then stated:

> "The Indian sovereignty doctrine is relevant, then, *not because it provides a definitive resolution of the issues . . . ,* but because it provides a backdrop against which the applicable treaties and federal statutes must be read." (Emphasis added) *Id.* 172.

The Court then implicitly recognized that the Ninth Circuit correctly relied on *Kagama* when it said:

> "It must always be remembered that the various Indian tribes were *once* independent and sovereign nations and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that '[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomolous one and of a complex character . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; *not as States, not as nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *United States v. Kagama,* 118 U.S., at 381-382." (Emphasis added) *Id.* 172-173.

The Court, after analyzing the applicable treaties, statutes and enabling acts recognized that the Navajo Tribe exists and functions, not because it is a sovereign state, but only because it was created by the United States as an instrument of Congressional policy. It therefore said that the 1868 Treaty between the Navajos and the federal government "is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions". *Id.* 174. That tribes are not sovereign like states was further recognized when the Court quoted from the Arizona Enabling Act of 1912, 36 Stat. 569, which recognizes that the tribe and its lands will forever "be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States". *Id.* 175.

During 1973, the Court was also confronted with the claim of an Indian defendant that he was denied equal protection of the laws because during his Major Crimes Act trial he was denied a lesser included offense instruction though such was merited by the evidence. *Keeble v. United States,* 412 U.S. 205 (1973). Similar to its position in this case, in *Keeble* the petitioner argued that under the dicta of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Ex Parte Crow Dog,* 109 U.S. 556 (1883); and *Talton v. Mayes,* 163 U.S. 376 (1896), such a lesser included instruction should not be given because Indian tribes possess inherent exclusive jurisdiction over tribal criminal violations. Therefore, "the interests of an individual Indian defendant in obtaining a jury instruction on a lesser offense [not contained in the United States Code] must fall before the congressionally sanctioned interests of the tribe in preserving its inherent jurisdiction". *Id.* 209.

The Court implicitly rejected this claim, as it had expressly done in *McClanahan.* Instead of agreeing that the notion of tribal sovereignty should take precedence over the individual rights of tribal members, the Court looked to the language, purpose and legislative history of the Major Crimes Act, and Rule 31(c) of the Federal Rules of Criminal Procedure. It then held that an Indian, like any other criminal defendant in federal court, is entitled to a lesser included offense instruction though such an offense might not be found in the United States Code. *Id.* 210-214. Striking a theme similar to that of *McClanahan,* the Court noted that when the Major Crimes Act was enacted in 1885, Congress implicitly rejected the notion of inherent tribal jurisdiction over criminal matters as being "either non-existent or incompatible with principles that Congress thought should be controlling". *Id.* 210. Under the circumstances, *Keeble* supports the respondent's claim that Indian tribes are not sovereign like states.

United States v. Mazurie, 419 U.S. 544 (1975), contrary to the urging of the petitioner at pp. 8, 18 and 20 of its brief, clearly indicates that the Court does not consider Indian tribes to be sovereign like states. In *Mazurie,* the Court first examined the commerce clause, Art. I §8(3), and the definition of Indian country in 18 U.S.C. 1154. It then held that Congress, *not* the Indian tribes, has the inherent and complete power to exercise or delegate to the tribes the regulation of the sale of alcoholic beverages within the Indian country. *Id.* 555-556. The Court reasoned that tribes exist as self-governing entities not because of any notion of inherent tribal sovereignty, but only because they have been delegated authority by Congress to control their internal affairs. *Id.* 553-557. Although it had already laid the platonic notion to rest in *Mescalero* and *McClanahan,* the Court nevertheless stated that tribes have "attributes of sovereignty" and "possess a certain degree of independent authority over matters that effect the internal social relations of tribal life". *Id.* 557. But the Court refrained, as it had done in *Keeble, Mescalero* and *McClanahan,* from relying on any broad concept of inherent tribal jurisdiction over its internal affairs when it said, "[w]e need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance Number 26", which required a state and tribal license to sell liquor within the Indian country. *Id.* 557.[39]

In *United States v. Antelope*, 430 U.S. 641 (1977), this Court again clearly rejected the notion that Indian tribes are sovereign like states. In *Antelope*, Indian defendants convicted of murder under the Major Crimes Act claimed that they were denied equal protection because the state murder statute, unlike the Major Crimes Act, did not contain a felony-murder provision. Therefore, they claimed that they were being subjected to racial discrimination because the trial of a non-Indian in state court for the same on reservation incident would require the prosecution to carry a greater burden of proof in order to convict.[40] In unanimously rejecting the claim of racial discrimination the Court said, "[f]ederal regulation of Indian tribes, therefore, is goverance of *once*-sovereign, political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians' . . ." (Emphasis added) *Id.* 646. The Court cited *United States v. Heath*, 509 F.2d 16, 19 (9th Cir., 1974), and explained that the Indian defendants were recognized and prosecuted as Indians not

---

[39] Apparently inconsistent with its position in this case, in *Mazurie*, the Solicitor implicitly conceded that tribes do not have the sovereign powers of states when it urged to the Court that 18 U.S.C. 1154 was not void for vagueness and that "Congress has the constitutional authority to control the sale of alcoholic beverages by *non-Indians* on fee-patented land within the boundaries of an Indian reservation and that Congress could validly make a *delegation* of this authority to a reservation's tribal council". (Emphasis added) *Id.* 546. The source and extent of tribal authority over conduct of non-Indians within the Indian country is presently before this Court in *Oliphant v. The Suquamish Tribe*, ___ U.S. ___ (#76-5729). In its amicus brief in *Oliphant*, pp. 13-49, the petitioner relies on the notion of residual tribal autonomy (sovereignty) as the source for such jurisdiction, *not* Congressional delegation of power to tribes as it urged in *Mazurie*.

[40] The Court recognized that under the doctrine of *United States v. McBratney*, 104 U.S. 621 (1882), state courts have jurisdiction over crimes on the reservation involving only non-Indians, absent applicable federal law, *United States v. Antelope*, Id. 643 in 2; 644 in 4; 648 in 8.

because of their anthropological classification, but only because of their legal membership in tribes duly recognized by the federal government. *Id.* 646-647, n. 7. Such status and "legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution". *Id.* 647, n. 8.

The petitioner correctly notes that in *Antelope* the Court, citing *United States v. Mazurie*, supra, said that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are 'a separate people' possessing 'the power of regulating their internal and social relations' . . ." *Id.* 641. However, a fair reading of *Antelope* shows that these characterizations are used by the Court not because tribes are sovereign entities, but only because of their unique status as wards of the federal government while living within a duly recognized reservation under federal regulation. *Id.* 645-648. In addition to the Ninth Circuit analogy of Indian reservations to territories, 545 F.2d at 1257-1258 (Pet. App. A., pp. 5a-6a), this Court analogized the reservations to federal enclaves, although it noted that "they differ in certain respects". *Id.* 648, n. 9.[41]

---

[41] *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir., 1976) cert. granted, *sub nom.*, *Oliphant v. The Suquamish Tribe*, ___ U.S. ___ (#76-5729), as well as other cases cited at pp. 27-31 of its brief, does not support the claim that tribes are sovereign like states for double jeopardy purposes. This issue was not reached by *Oliphant*, which merely held that a tribe, absent contrary treaty and statutes, has the inherent jurisdiction to subject a non-Indian to tribal court prosecution for reservation conduct in violation of tribal law. Though *Oliphant* and the petitioner liberally use the term "inherent tribal sovereignty", such use is inaccurate and misleading. In essence, *Oliphant*, was dealing with the residual governing powers of a federally recognized tribe, not their sovereign existence as separate entities apart from prior federal recognition. In any event, the respondent urges that the dissent in *Oliphant* correctly concluded that any presumption in favor of inherent tribal sovereignty no longer exists. 544 F.2d at 1019. It stated that the concept is now used by the Courts only in "determining the extent to which States can properly exercise jurisdiction where the federal government has decreed a

(continued)

7. The fact that Indian tribes are not sovereign like states, the lack of significant "undesirable consequences" and the availability of acceptable non-judicial remedies for any lack of federal control over tribal courts requires affirmance of Wheeler.

The "undesirable consequences" and hinderance to federal law enforcement argument of the petitioner in Part B(2), pp. 35-43, of its brief is the rationale outlined in *Lanza, Abbate* and *Bartkus,* for the validity of the Double Jeopardy Clause dual sovereignty exception concerning successive state and federal prosecutions. Therefore, if Indian tribes are not sovereign like states, but are arms of the federal sovereign, this argument must fail. If tribes are arms of the federal sovereign, Congress in the exercise of its plenary powers, would be able to remedy any "undesirable consequences" and any hinderance to federal law enforcement that might result from the affirmance of *Wheeler* by this Court.

Only by assuming *arguendo* that Indian tribes are sovereign like states to the remaining hinderances to law enforcement and undesirable consequences outlined in *Lanza, Bartkus* and *Abbate* become possible realities in the tribal-federal setting. A review of the undesirable consequences predicted by the petitioner, however, shows that the petitioner maintains an incorrect view of the significance of the consequences it foresees and of the true nature of the present tribal-federal relationship.

One consequence foreseen by the petitioner is that Indian defendants will *avoid* federal prosecution by subjecting themselves to prosecution in tribal court, thereby invoking double

---

(footnote continued from preceding page)
measure of autonomy for the tribes. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right o[r] Congressional License*? 51 Notre Dame Law. 600, 627 (1976). The term 'sovereignty', then, is merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs. Id. at 629-631; see *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (Citations omitted)." *Id.* 1015.

jeopardy protection.[42] This avoidance argument necessarily infers that an Indian defendant will intentionally and knowingly subject himself to tribal prosecution in order to prevent the subsequent Major Crimes Act prosecution. However, in *Abbate v. United States,* pp. 202-203, n. 2, supra, Justice Black, dissenting, noted that jeopardy might not attach to such a sham prosecution and that a subsequent district court trial would be constitutional, citing *Edwards v. Commonwealth,* 233 Ky. 356, 25 S.W.2d 746, and *United States v. Mason,* 213 U.S. 115, 125.

The petitioner, citing *United States v. Walking Crow,* slip op. 6, supra, then argues that "federal authorities would be virtually powerless" due to the lack of effective federal control over the day to day operation of the tribal courts, to prevent the *Wheeler* situation from again occurring. (Pet. Brief, pp. 37-38). Therefore, Congress would react by further restricting the self-governing powers of tribes and the powers of tribal courts, contrary to the present policy of fostering tribal self-government. This illogical argument,[43] which is also the theme of the American Indian Policy Review Commission, *Final Report,* pp. 159-160, discussion regarding the impact of *Wheeler,* unfairly magnifies the seriousness of the problem and evidences a gross misunderstanding of the reality of tribal-federal Major Crimes Act prosecutions. It also ignores the established fact that Indian policy is for Congress, not the established fact that Indian policy is for Congress, not the judiciary, to decide. ***United States v. Kagama,*** pp. 378-385, supra; ***Winton v. Amos,*** pp. 391-392, supra; ***United States v. Antelope,*** 645-646, supra.[44]

---

[42] The petitioner argues: "[I]t seems reasonable to assume that many persons who have committed serious crimes on the reservation would seek to avoid [major crimes prosecution] by first standing trial (or pleading guilty) in tribal court", thereby invoking the *Wheeler* doctrine barring a second prosecution in District Court for the same conduct. (Emphasis added) Pet. brief, p. 37.

[43] The well known lack of effective federal control over and the independence of the territories of the United States, such as Puerto Rico, was recognized in *Examining Board v. Flores de Otero*, 596-597, supra. Nevertheless, the refusal of the Court to extend the Dual Sovereignty exception to territories despite such a lack of control, *Grafton v. United States, supra*, and *Puerto Rico v. The Shell Co., supra*, makes the petitioner's "undesirable consequences" argument irrelevant; instead, it supports the court of appeals' statement that "[t]he Court has construed its 'dual sovereignty' rationale narrowly and has never applied it outside of the federal court or state court context". 545 F.2d at 1257 (Pet. App. 4a).

Walking Crow, Colliflower and ***United States v. LaPlant,*** 156 F. Supp. 660 (D. Mont., 1957)[45] are the only other reported cases over the last 20 years where Indians have successfully raised a double jeopardy type claim as a bar to successive tribal-federal prosecutions. Although the petitioner cites a few other cases where the double jeopardy claim has been raised in a District Court trial based upon the same conduct, in none of these did the court find the necessary identity of offenses and the claims failed.[46] On the other hand, in view of the American Indian Policy Review Commission, ***Final Report,*** recognition, pp. 163-164, that 70,000 cases were handled by the tribal courts in 1973, and that that number has increased each year thereafter, the problem is certainly not as serious as suggested. On the contrary, this lack of successful double jeopardy claims as a bar to successive tribal-federal prosecutions is strong indication that

---

[44] Reliance by the petitioner on the majority report of the American Indian Policy Review Commission is wholly misplaced. Vice-Chairman Meeds' (D-Wash.) dissent to the *Final Report*, at 567-612, not only discredits the majority's scholarship, but also ably and forcefully puts the entire notion of tribal sovereignty in proper perspective. This Court is urged to examine the Meeds dissent.

[45] In *LaPlant*, the government wisely conceded that the defendants had been placed in jeopardy by their tribal court assault convictions and moved to dismiss the information. The Court granted the motion. 156 F. Supp. 661-662.

[46] ***United States v. Keeble***, 459 F.2d 757 (8th Cir.), reversed 412 U.S. 205; ***United States v. Kills Plenty***, 466 F.2d 240 (8th Cir.); ***United States v. DeCoteau***, 516 F.2d 16 (8th Cir.), and ***United States v. DeMarrias***, 441 F.2d 1304 (8th Cir.), cited at p. 37, n. 19 of petitioner's brief.

tribal-federal coordination of major crimes prosecutions is being properly carried out and that the problem is ***de minimus.***

In Arizona, which contains the largest reservations and Indian population of any federal district, the real problem stems from what is viewed by the tribes as the failure by the United States Attorney to exercise his responsibility for prosecuting major crime cases presented to him for prosecution.[47] Thus, the cause of any hinderance to federal law enforcement on the reservation is not lack of control or tribal unwillingness to cooperate as claimed by the petitioner.[48]

---

[47] In an article on the front page of ***The Wall Street Journal***, December 28, 1976, the federal prosecutor in Arizona was criticized by a tribal judge who said, "[w]e don't get any satisfaction from the U.S. Attorney's Office". The article noted that 80% of 480 cases presented for Major Crimes Act prosecution from the Navajo Reservation during one year were declined by the United States Attorney. For his part, the Chief of the Criminal Division of the United States Attorney's Office in Phoenix was quoted as saying, "[W]e don't have [Indian] felons going unprosecuted". He then recognized the real problem when he said that the United States Attorney considers the evidence on hand, the seriousness of the offense and the hardship that distance and language barriers would impose on the investigator and witnesses in deciding whether to prosecute in the Phoenix district court or to defer prosecutions to tribal courts.

[48] The procedure normally followed in the District of Arizona in prosecuting major crimes is described in the National American Indian Court Judges Association publication, ***Justice and The American Indian***, Library of Congress, #74-76967, Vol. 5, Ch. 2. As occurred in this case, the procedure is initiated by either the tribal policeman or the B.I.A. special officer who first investigates the crime. Once an initial determination is made that a possible violation of the Major Crimes Act has occurred, the F.B.I. is usually notified and immediately brought into the investigation. Thereafter, either the B.I.A. special officer or the F.B.I. agent presents all the evidence to the United States Attorney for prosecution in the federal district court. Though tribal charges may be filed as a holding device, very seldom does a Major Crimes Act violation result in a conviction in tribal court as it did in ***Wheeler***. In this case, a lack of communication between the B.I.A. investigator and the Tribal court may be inferred; however, the record does not clearly show why the respondent was not prevented from pleading guilty to what was already considered a potential Major Crimes Act rape prosecution. (A. 20).

There are also non-judicial solutions, acceptable to advocates of tribal self-government, should the affirmance of *Wheeler* in fact result in a serious hinderance to federal law enforcement in Indian country. As was suggested by the dissent in *Bartkus*, 359 U.S. at 157, supra, and *Abbate*, 359 U.S. at 202, n. 2, supra, if Congress in the exercise of its vested power "can make certain conduct a federal crime, it also has the power to protect the national interest. It can take exclusive jurisdiction over the crime or, if it wishes to allow [tribes] concurrent power, it can define the offense and set minimum penalties which would be applicable in both tribal and federal courts." *Id.* 202, n. 2. This would have the presently desirous effect of preserving the integrity and independence of tribal self-government.

Congress could also remedy the *Wheeler* problem by other types of legislation,[49] as it did when it amended the Major Crimes Act in 1966, 1968 and 1976,[50] and when, in response to cases recognizing constitutional defects in 18 U.S.C. 1153, it redefined crimes, added new crimes and provided penalties for crimes that were found to be unenforceable because of either defective or non-existent penalty provisions.[51]

---

[49] In its *Final Report*, the American Indian Policy Review Commission made many findings and recommendations to Congress for legislative revision of policy towards the Indian tribes, including several changes to strengthen the tribal justice systems. *Id.*, 169-168. However, after expressing concern for the federal instrumentality versus tribal sovereignty ramifications of the *Wheeler* decision, at 158-160, the Commission found and recommended "that no legislative action is necessary at this time". *Id.* 160.

[50] See discussion of amendments to 18 U.S.C. 1153, p. 27, supra.

[51] See *Acunia v. United States*, 404 F.2d 140 (9th Cir., 1968), where the defendant's incest conviction was reversed because at the time of his prosecution 18 U.S.C. 1153 did not specify a penalty for incest; and *United States v. Cleveland*, 503 F.2d 1067 (9th Cir., 1974), where the Court held that differing burdens of proof between Indian and non-Indian defendants prosecuted in federal court for assault arising from the same transaction denied the Indian defendants equal protection of the law.

Finally, affirmance of the Wheeler decision will very likely enhance the independence and "sovereignty" of tribes and tribal courts. If double jeopardy bars successive prosecutions in tribal and federal courts then the federal courts, as well as the tribal courts, would have to recognize the adjudications of each other, thereby nurturing tribal integrity and independence. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev., 387, 406 (1974).

It is highly unlikely, therefore, that the *Wheeler* problem is either as significant as the petitioner and the American Indian Policy Review Commission claim or that it will produce an imperative that Congress restructure and, in effect, reduce the authority of tribal courts. If such were to occur as a result of the affirmance of *Wheeler*, it would, as the Chairman of the American Indian Policy Review Commission recognized, *Final Report*, p. (III), be a policy matter for Congress, not the judiciary to resolve.

In conclusion, in dividing powers between the states and the United States, the Constitution assumes that there are but two entities to whom such powers may be allocated. This assumption is confirmed by the Tenth Amendment to the Constitution, p. 10, n. 4, supra, the clear language of *United States v. Lanza*, *Bartkus v. Illinois*, *Abbate v. United States*, the holdings of *Grafton v. United States*, *Waller v. Florida*, *Puerto Rico v. The Shell Co.* and by the other authorities discussed above.

It is clear from a thoughtful reading of the Constitution and authorities discussed herein, that sovereignty in these United States exist only in the United States and the states, and that Indian tribes, to the extent that they are granted governmental powers at all, exercise only powers of limited self-government under the authority of the United States. Therefore, since the Indian tribes govern themselves wholly under the authority of the United States, the dual sovereignty exception to the Double Jeopardy Clause does not apply.

B. Under the facts of this case, no other exception to the double jeopardy clause applies.

In Part C of its brief, the petitioner makes an "either-or" type argument in urging that "[t]he circumstances of this case either bring it within one of the the recognized exceptions to the rule barring successive prosecutions or warrant further recognition of a further exception". (Pet. brief, p. 46). A review of these exceptions shows that they are totally inapplicable to the facts of the respondent's case and the petitioner's argument must fail.

In *Jeffers v. United States,* ____ U.S. ____ (No. 75-1805, 6-16-77), concurring opinion, slip op. 13-15, this Court noted several exceptions to the bar against successive prosecutions. One exception, which allows a second prosecution by the same sovereign "when facts necessary to the greater [charge] were not discovered despite the exercise of due diligence before the first trial" (*Jeffers v. United States,* slip op. 15, supra; ***Brown v. Ohio,*** ____ U.S. ____ (75-6933, slip op. 8, n. 7), both cases relying on Mr. Justice Brennan's concurrence in *Ashe v. Swenson,* 397 U.S. 436, 453, n. 7), does not apply to this case for the following reasons: (1) There is no evidence in the record to support this claim. Contrary to the petitioner's suggestion, the evidence shows that the B.I.A. investigator (a federal agent) was already aware of the necessary facts to sustain the statutory rape prosecution on October 17, 1974, the day before the respondent was convicted by the tribal court. The record also shows that on October 16, 1974, the tribal police officer and the B.I.A. investigator arrested and interrogated the respondent at the scene of the crime. The next day the B.I.A. officer investigated the rape complaint and obtained the respondent's statement. (A. 15-24). On October 18, 1974, the respondent pleaded guilty in tribal court and was convicted and sentenced for contributing to the delinquency of a minor and disturbing the peace. (A. 7-10). This shows that all facts necessary to the prosecution of the statutory rape charge were available to the federal authorities by the exercise of due diligence before the tribal court prosecution occurred; (2) In addition, the United States Attorney admitted a lack of due diligence when he stated the morning of trial, February 5, 1976, 16 months after the respondent's conviction, that until that day he was unaware of the lesser included offense conviction. (A. 26). Contrary to the petitioner's claim, this lack of diligence, as well as the manpower and logistics problems of Major Crimes Act prosecutions in the District of Arizona, discussed in Part 7, supra, are the real reasons for any "undesirable consequences" or hinderance to federal law enforcement that might arise as a result of a tribal court conviction barring a subsequent Major Crimes Act prosecution.

Relying on a theme of tribal independence, the petitioner next argues that this due diligence exception applies because (1) tribal courts are operating "wholly apart from federal courts" (Pet. Brief, 47); (2) the tribal court prosecutor is "in no respect" controlled by the United States Attorney (Pet. Brief, 47); and (3) because of their "sharply limited sentencing power" (Pet. Brief, 48-49),[52] tribal courts cannot adequately punish Major Crimes Act violators and thereby vindicate federal interests by matching punishment with the gravity of the offense. Assuming *arguendo* that this situation exists (although it does not), this does not show that the "facts necessary to the greater [charge] were not discovered despite the exercise of due diligence before the [respondent's] first trial". *Jeffers v. United States,* slip op. 14, thereby causing this exception to apply.[53] Therefore, this exception does not apply.

---

[52] On its face, the petitioner's apparent analogizing of the "sharply limited sentencing power of Indian tribal courts" (Pet. Brief, 48-49, n. 29), to summary courts-martial courts at issue in *Middendorf v. Henry,* 425 U.S. 225 (1976) (non-criminal, non-adversary and non-judicial proceedings where one officer is judge, jury, prosecutor and defense counsel) is greatly misleading and unsupported by the record. Such posturing clearly evidences the petitioner's tenuous position in urging that a variety of Double Jeopardy exceptions apply to the respondent's case.

Relying on footnote 7 at page 453 in Mr. Justice Brennan's concurring opinion in *Ashe v. Swenson,* 397 U.S. 436, the petitioner next urges in Part C(3), pp. 49-51, of its brief that another exception to the Double Jeopardy Clause exists because "no single court had jurisdiction of all the alleged crimes", 397 U.S. at 453, n. 7. In support of this exception, the petitioner reasons that because the tribal court did not have jurisdiction over the Major Crimes Act statutory rape charge, the district court trial would be the first time that the respondent would be in jeopardy for this charge. Conversely, in federal district court, the respondent also would not be subject to the lesser included tribal offense (Contributing to the Delinquency of a Minor) because the district court has only Major Crimes Act jurisdiction over Indians and the lesser included offense is not a federal violation. This argument is incorrect and must fail.

This "separate jurisdictions" exception is not supported by any cited authority (c.f. 397 U.S. at 453, n. 7) and is contrary to the teachings of *Waller v. Florida, supra, Grafton v. United States, supra, Puerto Rico v. The Shell Co., supra,* as well as the holding of *Brown v. Ohio,* supra. In *Brown,* the Court established the general rule that "the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense". *Jeffers v. United States,* plurality opinion, slip op. 12. In addition, the application of this exception is directly contrary to Mr. Justice Brennan's concurring opinion in *Brown,* at p. ____ , that a defendant should be prosecuted "in

---

[53] In reality, the federal government's complete plenary control over tribes and tribal courts, fully discussed in Parts (4) and (5), supra, and as exemplified by the anatomy of a federal Major Crimes Act prosecution discussed in Part (7) supra, shows that the United States Attorney, through B.I.A. and F.B.I. agents, is in complete control of Major Crimes Act investigations and tribal court handling thereof.

one proceeding, except in extremely limited circumstances not present here, of 'all the charges against [him] that grow out of a single criminal act, occurrence, episode, or transaction'. *Ashe v. Swenson,* 397 U.S. 436, 453-454, and n. 7 (1970) (Brennan, J. concurring). See *Thompson v. Oklahoma,* ____ U.S. ____ 1977) (Brennan, J. dissenting), and cases collected therein".

Additionally, it is of no significance that the tribal court which first tried the respondent for a lesser included offense did not have jurisdiction to try the greater offense. In *Waller v. Florida, supra,* and *Grafton v. United States, supra,* the city court and military court that tried the lesser offenses did not have jurisdiction over the greater offenses thereafter tried by the state and territorial courts respectively. See *Farragut v. City of Tampa,* 22 S.2d 645 (Fla., 1945), recognizing that the municipal court, like the tribal court, has jurisdiction only over minor offenses. See also *Pettyjohn v. Evatt,* 369 F.Supp. 865 (E.D. Tenn., 1974), where, citing *Waller* and *Culbertson v. Wainwright,* 453 F.2d 1219 (5th Cir. 1972), the Court held that a municipal court conviction barred a subsequent state court prosecution even though the municipal court had no jurisdiction over state offenses. As occurred in this case, in *Pettyjohn* the Court observed that any breakdown in communication between the local and state authorities should not force a defendant to "climb a ladder of multiple criminal prosecutions from the 'least' included offense to the greatest". *Id.* 872. In addition, in *Ashe v. Swenson,* p. 446, supra, the Court said that the Double Jeopardy Clause should be primarily concerned with protecting the accused from having to " 'run the gantlet' a second time. *Green v. United States,* 355 U.S. 184, 190."[54]

---

[54] Contrary to the suggestion of the petitioner, in *Keeble v. United States, supra,* the Court did not preclude a defendant subjected to a Major Crimes Act prosecution from pleading guilty to a lesser included offense although such an offense might not be a violation of the United States Code. In fact, one experienced commentator suggests that such a procedure is available. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict,* 22 Univ. of Kansas, L. Rev., p. 387, 403 (1974).

The petitioner continues the exceptions argument by next suggesting at p. 50, n. 32, of its brief that the waiver rule of *Jeffers v. United States,* slip op. 14, should be applied to this case. This argument must be rejected for the reason that, unlike the rule and facts of *Jeffers,* the respondent did not expressly ask for separate trials on the greater and lesser offenses, or, in connection with his opposition to trial together, fail to raise the issue that one offense might be a lesser included offense of the other, thereby waiving the right to claim protection of the Double Jeopardy Clause. *Id.* slip op. 16.

Finally, the petitioner proposes at p. 44, n. 26, of its brief that a tribal-federal dual authority exception should be created and applied to the unique relationship that exists between Indian tribes and the federal government. Similar to his argument in Part B(1) and C(2) of its brief, discussed above, the petitioner urges this exception because, although Indian tribes and the federal government are arms of the same sovereign, they have separate legislative bodies and distinct laws and interests to vindicate. This argument fails because it is simply a restatement of the petitioner's principle argument that Indian tribes are separate sovereigns for double jeopardy purposes; consequently, the dual sovereignty exception applies to allow successive tribal and federal prosecutions for the same offense. In addition, if such a rule was adopted by this Court, it would necessarily result in the overruling of *Grafton v. United States* and *Puerto Rico v. The Shell Co.* In addition, in urging the application of what it considers to be a new exception to the Double Jeopardy Clause, the petitioner ignores the recognized fact that this Court has always frowned on dual prosecutions. See *Rinaldi v. United States,* 22 Cr.L. at 4063, supra, discussed in Part (2), above. Finally, *Brown, Waller, Puerto Rico v. The Shell Co.* and *Grafton* each refused to apply the dual sovereignty exception to governmental entities whose separate legislative bodies and interests are far more distant and different than those of the Indian tribes and the federal government.

In conclusion, although the above-discussed exceptions to the Double Jeopardy Clause may exist, by not discussing them the Ninth Circuit correctly recognized that none of these exceptions apply under the circumstances of the respondent's case.[33]

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectively submitted,

THOMAS W. O'TOOLE
Federal Public Defender
District of Arizona
230 North First Avenue
Room 6425
Phoenix, Arizona 85025
(602) 261-3561

Attorney for Respondent

---

[33] The petitioner is incorrect in stating in Part C of its brief that the Ninth Circuit decision "rests on the assumption that, unless the dual sovereignty principle applies, the Double Jeopardy Clause *inevitably* bars prosecution of a defendant who has been convicted [by the same sovereign] of a lesser included offense based on the same acts". (Emphasis added). By its silence, the Ninth Circuit recognized that no exception is applicable to the respondent's case.